142-682

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 140.

EZEKIEL CLARK, PLAINTIFF IN ERROR,

vs.

LEVERETT B. SIDWAY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 1, 1888.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Romanzo Bunn, district judge of the United States for the western district of Wisconsin, on Thursday, the seventeenth day of May, in the adjourned May term of said court, in the year of our Lord one thousand eight hundred and eighty-eight, and of our Independence the one hundred and twelfth year.

WM. H. BRADLEY, *Clerk.*

LEVERETT B. SIDWAY, for the Use of JOHN R. LINDGREN, *vs.* EZEKIEL CLARK.	Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the thirteenth day of October, 1880, came the plaintiff, by his attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, his præcipe for a writ of summons, and also at the same time filed his bond for costs in said above-entitled cause; which said præcipe and bond are respectively in the words and figures following, to wit:

2 *Præcipe.*

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois, to the December Term, A. D. 1880.

LEVERETT B. SIDWAY, for the Use of JOHN R. LINDGREN, Plaintiff, *vs.* EZEKIEL CLARK, Defendant.	Assumpsit. Damages, $8,000.00.

The clerk of said court will issue a summons in the above-entitled cause to said defendant in a plea of trespass on the case on promises to the damage of said plaintiff in the sum of eight thousand dollars, direct the same to the marshal of said district to execute, and make it returnable to the December term of said court, A. D. 1880.

KALES & SMITH,
Plaintiff's Attorneys.

To Wm. H. Bradley, Esq., clerk.
Chicago, October 13, 1880.

Endorsed: Filed this 13th day of October, A. D. 1880. W. H. Bradley, clerk.

1—140

3 *Bond for Costs.*

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

Circuit Court, October Term, A. D. 1880.

LEVERETT B. SIDWAY, for Use of JOHN R. LINDGREN, *vs.* EZEKIEL CLARK. } In Assumpsit.

I enter myself security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him I hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this 13th day of October, A. D. 1880.

F. H. KALES.

Endorsed: Filed Oct. 13, A. D. 1880. W. H. Bradley, clerk.

4 On the same day, to wit, on the thirteenth day of October, 1880, there issued out of said clerk's office a writ of summons in said entitled cause; which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Summons.

Circuit Court of the United States of America, Northern District of Illinois, *ss:*

The United States of America to the marshal of the northern district of Illinois, Greeting:

We command you to summon Ezekiel Clark, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the third Monday of December next, to answer unto Leverett B. Sidway of a plea of trespass on the case upon promises, to his damage, as it is alleged, of eight thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 13th day of October, in the year of our Lord one thousand eight hundred and eighty, and of our Independ-

[SEAL.]

5 ence the 105th year.

W. H. BRADLEY, *Clerk.*

Marshal's Return.

I served the within writ upon Ezekiel Clark, therein named, by reading the same to him and in his presence and hearing on the 13th day of October, A. D. 1880.

JESSE S. HILDRUP,
U. S. Marshal,
By L. O. GILMAN, *Deputy.*

Endorsed: Filed Oct. 16, A. D. 1880. W. H. Bradley, clerk.

Afterwards, to wit, on the twenty-ninth day of November, 1880, came the plaintiff, by his attorneys, and filed in said clerk's office his declaration in said entitled cause; which said declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

In the Circuit Court of the United States for the Seventh Circuit and Northern District of Illinois, of the October Term, A. D. 1880.

6 Leverett B. Sidway, who is a citizen of the State of Illinois, for the use of John R. Lindgren, complains of Ezekiel Clark, who is a citizen of the State of Iowa, and who hath been summoned, etc., of a plea of trespass on the case on promises—

For that whereas heretofore, to wit, on the 12th day of August, A. D. 1872, one Charles Cleaver and Mary, his wife, by their certain warranty deed of that date, did grant, bargain, and sell unto the said plaintiff lots seven (7) and eight (8), in the subdivision of lots five (5), six (6), seven (7), and all but the north ten (10) feet of lot eight (8), in block six (6), in Cleaverville, in the county of Cook and State of Illinois; subject, nevertheless, to a certain trust deed in and by the said warranty deed recited to have been executed by said Cleaver and wife to Benjamin E. Gallup to secure the payment of a certain note for eight thousand dollars ($8,000.00), payable (5) five years from date, with interest at ten per cent. per annum, which said amount of principal and interest it was, in and by the said warranty deed of said Cleaver and wife, recited that the said plaintiff did thereby assume and agree to pay and hold the said Cleaver harmless therefrom; which said deed was, to wit, at the northern district of Illinois aforesaid, to wit, on the day and year last aforesaid, accepted by
7 the said plaintiff, with the recitals and agreement aforesaid; that afterwards, to wit, on the 23d day of November, A. D. 1875, the said plaintiff and his wife, by their certain deed of that date, which was duly recorded on the 26th day of November, 1875, in the recorder's office of Cook county aforesaid, did, at and for certain considerations, thereby convey to the said defendant an undivided one-half interest in said lots seven (7) and eight (8), in the

subdivision aforesaid, but subject, nevertheless, as recited in the said deed of conveyance, to the trust deed made by said Cleaver and wife to secure the payment of the said note for eight thousand dollars, as aforesaid; and in and by the said last-mentioned deed the said defendant, as part of the consideration for the making of the said deed, undertook and promised the said plaintiff that he, the said defendant, would and that he did in and by the said deed assume and agree to pay one-half of the said note of eight thousand dollars, with interest thereon since August 12th, 1872, and that he, the said defendant, would save the said plaintiff harmless therefrom, as well as from one-half of any further liability he, the said plaintiff, might be under, by, and through any or all of the provisions in said above-mentioned trust deed contained; that he, the said defendant, did then and there take and receive the said deed on, to wit, the
8 said 23d day of November, A. D. 1875, to wit, at the northern district of Illinois aforesaid, containing the promise and undertaking aforesaid to be kept and performed by him, to wit, at the northern district of Illinois aforesaid.

And said plaintiff further saith that on, to wit, the 3d day of July, A. D. 1875, said note for $8,000.00, with certain interest, did become due and payable, to wit, at the northern district aforesaid, and that afterwards, to wit, on the 12th day of October, A. D. 1880, to wit, at the district aforesaid, the said defendant wholly neglected and refused to pay the one-half of said note, with interest as aforesaid, or any part thereof, although often requested so to do; nor did the said defendant save or keep harmless the said plaintiff from the payment of the said note or the said interest. By means whereof the said defendant then and there, to wit, at the district aforesaid, undertook and faithfully promised to pay to the said plaintiff, when thereunto afterwards requested, the one-half of said note, to wit, $4,000.00, and interest thereon from the 12th day of August, A. D. 1872.

And whereas also the said defendant afterwards, to wit, on the 12th day of October, A. D. 1880, to wit, at the northern district of Illinois aforesaid, became and was indebted to the said plaintiff in the further sum of eight thousand dollars, of lawful money
9 of the United States of America, for money before that time lent and advanced by the said plaintiff to the said defendant and at the special instance and request of the said defendant; and in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant and at the like special instance and request of the said defendant; and in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff; and in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff, and, being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, to wit, at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count

mentioned when the said defendant should be thereunto afterwards requested.

Yet the said defendant, not regarding his said several promises and undertakings, but contriving and intending to deceive, &c., the said plaintiff in this behalf, hath not as yet paid the said several sums of money or any or either of them or any part thereof to the said plaintiff, although often requested so to do; but the said defendant to pay him, the said plaintiff, hath hitherto wholly neglected and refused and still doth neglect and refuse, to the damage of the said plaintiff of eight thousand dollars ($8,000.00), and therefore he brings his suit, &c.

By KALES & SMITH,
Attorneys for said Plaintiff.

Copy of Instrument Sued On.

This indenture, made this twenty-third day of November, in the year of our Lord one thousand eight hundred and seventy-five, between Leverett B. Sidway and Louise Sidway, his wife, of the city of Chicago, in the county of Cook and State of Illinois, party of the first part, and Ezekiel Clark, of the city of Iowa City, in the county of Johnson and State of Iowa, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of five thousand ($5,000.00) dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have and by these presents do remise, release, alien, and convey unto the said party of the second part and to his heirs and assigns forever all the following-described lot, piece, or parcel of land, situated in the county of Cook and State of Illinois, known and described as follows, to wit: An undivided one-half (½) interest in lots seven (7) and eight (8), in the subdivision of lots five (5), six (6), seven (7), and all but the north ten (10) feet of lot eight (8), in block six (6), in Cleaverville, said lots being eighty (80) feet in width, fronting westerly on the Boulevard, by one hundred and twenty (120) feet in depth, and a twelve (12) foot alley in the rear; subject, however, to a certain incumbrance secured by a trust deed on the above-described premises and other property, dated July 1st, 1870, executed by one Charles Cleaver and Mary Cleaver, his wife, and given to secure the payment of a note of even date therewith, bearing ten (10%) per cent. interest, payable semi-annually, of the first days of January and July in each year, until the principal is fully paid, said note being for the sum of eight thousand ($8,000.00) dollars, and given by said Charles Cleaver, one-half (½) of which said note, with the interest thereon accrued, accruing, and to accrue from and since the twelfth (12th) day of August, A. D. 1872, the said Ezekiel Clark hereby assumes and agrees to pay and save the said Sidway harmless therefrom as well as from one-half (½) of any further liability he, the said Sidway, may be under, by, and through any or all of the provisions in said above-mentioned trust deed contained, together with all and singular the hereditaments and appurtenances thereunto

belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, or demand whatsoever of the said party of the first part, either in law or equity, of, in, and to the above-described premises, with the hereditaments and appurtenances:

To have and to hold the said premises above described, with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

And the said Leverett B. Sidway and Louise Sidway, his wife, party of the first part, for themselves, their heirs, executors, and administrators, do covenant, promise, and agree to and with the said party of the second part, his heirs and assigns, that they have not done or suffered to be done anything whereby the said premises hereby granted are or may be in any manner encumbered or charged, and that the said premises against all persons lawfully claiming or to claim the same by, through, or under them they will warrant and forever defend.

And the said party of the first part hereby expressly waive and release any and all right, benefit, privilege, and advantage,
13 and exemption under or by virtue of any and all statutes of the State of Illinois providing for the exemption of homesteads from sale or execution or otherwise.

In witness whereof the said party of the first part have hereunto set their hands and seals the day and year first above written.

LEVERETT B. SIDWAY. [SEAL.]
LOUISE SIDWAY. [SEAL.]

Signed, sealed, and delivered in the presence of—

—— ——.

STATE OF ILLINOIS, } ss:
County of Cook, }

I, Jas. S. Gibbs, a notary public in and for the said county, in the State aforesaid, do hereby certify that Leverett B. Sidway and Louise Sidway, his wife, personally know- to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

[NOTARIAL SEAL.] Given under my hand and notarial seal this twenty-fourth day of November, A. D. 1875.

JAS. S. GIBBS,
Notary Public.

14 No. 59925. Filed for record 26th Nov., A. D. 1875, at 9 o'clock a. m.

JAMES STEWART, *Recorder.*

STATE OF ILLINOIS, } ss:
County of Cook, }

I, James W. Brockway, recorder of deeds in and for said county, in the State aforesaid, do hereby certify that the annexed is a true and correct copy of the record of a certain instrument filed in my office the 26th day of Nov., A. D. 1875, as document No. 59925, and recorded in Book 542 of Records at page 580.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed my official seal, at Chicago, this 26th day of November, A. D. 1880.

JAMES W. BROCKWAY, *Recorder.*

Endorsed: Filed Nov. 29, 1880. W. H. Bradley, clerk.

15 Afterwards, to wit, on the twenty-first day of December, 1880, came the defendant, by his solicitors, and filed in said clerk's office his demurrer to the first count and pleas to the second count in said entitled cause; which said demurrer and pleas are in the words and figures following, to wit:

United States Circuit Court, Northern District of Illinois, Dec'r Term, A. D. 1880.

LEVERETT B. SIDWAY, for Use, &c., }
vs. } Assumpsit.
EZEKIEL CLARK. }

And now comes said defendant, by Paddock & Ide, his attorneys, and defends, &c., and says that as to the first count in said plaintiff's declaration in said cause this defendant should not be required to make answer or plead herein, because he says that said count and the matters therein alleged are insufficient in law in manner and form as therein alleged.

1. And by way of special demurrer to said count he further says that the same is defective and insufficient, in that the caption or introduction thereto fails to show that said Lindgren is a citizen
16 of a State other than the State of Iowa, of which latter State it is alleged that defendant is a citizen; nor does such fact otherwise or elsewhere appear.

2. And in that said count fails to state with sufficient certainty the supposed "consideration" for said supposed deed to defendant, and fails to show the execution and delivery to any person of said supposed note of $8,000.

3. And in that said count fails to show to whom said supposed "one-half of the said note of eight thousand dollars" was to be paid by the defendant, nor does said count show that plaintiff at any time suffered harm or damage from said note or was under any liability through said supposed deed of trust which resulted in harm or damage to him.

4. And in that said count fails to show how much money was due on said 3d day of July, A. D. 1875, on said supposed note for

$8,000.00, it being merely alleged that said note, with "certain interest," the amount not being stated, did then become due and payable, and in that it is nowhere in said count stated to whom said note became so due and payable, nor by whom the same was held.

5. And in that while said count shows said supposed note
17 to have fallen due on said 3d day of July, 1875, the supposed neglect and refusal of defendant to pay said supposed one-half of said note, with said interest, is not stated to have occurred until October 12, 1880; wherefore it should be intended as against said plaintiff that said note had in the meantime been paid in whole or in part.

And in that said count is otherwise defective and insufficient; wherefore the said defendant prays judgment, &c.

And as to the common counts in said declaration said defendant defends, &c., when, &c., and says that he did not undertake nor promise in manner and form as said plaintiff has above declared against him in said common counts; and of this he puts himself upon the country, &c.

And for a further plea as to said common counts he says that said plaintiff ought not, for reason of any matter alleged in said common counts, to have or maintain his aforesaid action against this defendant, because he says that by the laws of the State of Iowa, in which State defendant resided at the time when, &c., and has ever since resided, the said supposed causes of action in said common counts mentioned are barred and limited, unless commenced within five years from the time or times when they accrue
18 and not after, and because he says that the said supposed and pretended causes of action in said common counts set forth did not, nor did any or either of them, accrue within the period of five years next preceding the time of the commencement of this suit, and this he is ready to verify; wherefore he prays judgment, &c.

By PADDOCK & IDE, *His Att'ys.*

Endorsed: Filed Dec. 21, 1880. W. H. Bradley, clerk.

Afterwards, to wit, on the eleventh day of February, 1881, came the defendant, by his attorneys, and filed in said clerk's office additional pleas in said entitled cause; which said pleas are in the words and figures following, to wit:

19 *Additional Pleas.*

UNITED STATES OF AMERICA,
Northern District of Illinois.

In Circuit Court Thereof, Dec'r Term, A. D. 1880.

LEVERETT B. SIDWAY, for Use, &c.,
vs.
EZEKIEL CLARK.

And now comes said defendant, by Paddock & Ide, his attorneys,

and defends, &c., when, &c., and as to said first count in said plaintiff's declaration says that he, the said plaintiff, ought not for anything therein contained to have or recover against this defendant, because he says he did not undertake or promise in manner and form as said plaintiff has in that count declared against him; and of this he puts himself upon the country, &c.

And for a further plea as to said first count said defendant says that the said supposed promises and undertakings in that count mentioned, and each of the same, were at, &c., and ever since have been and still are without consideration, and this he is ready to verify, &c.

And for a further plea to said first count he says that for
20 anything therein contained the said plaintiff ought not to have or maintain his said suit, because he says that said supposed deed to this defendant in that count mentioned at the time when, &c., was made and intended by the parties thereto as a security to defendant for certain large sums of money, to wit, four thousand dollars, theretofore and then owing to defendant from said plaintiff, and that said supposed deed was not otherwise delivered to or received by defendant than as such security; that defendant was not the purchaser of said premises as in said count mentioned otherwise than for the purpose of holding said supposed deed by way of mortgage and security upon said indebtedness, whereof said plaintiff had notice, which defendant is ready to verify, &c.

And, by leave of court, for a further plea as to said first and second counts defendant says that heretofore, to wit, on the first day of January, A. D. 1880, at, &c., the said plaintiff was justly indebted to defendant in the sum of five thousand dollars for that much money of defendant loaned and advanced to the plaintiff at his instance and request; in the sum of other five thousand dollars for that much money paid by defendant to the use of plaintiff at his instance and request; in the sum of five thousand dollars for
21 that much money had and received by plaintiff to the use of defendant; in the sum of five thousand dollars for that much other money then and there found to be due from plaintiff to defendant on an account then and there stated between them, together with other large sums, to wit, one thousand dollars then and there due for interest on said amounts from said plaintiff to defendant; and, being so indebted in consideration thereof, then and there undertook and promised to pay to defendant the said sums of money and interest on request at, &c.; yet, though many times requested so to do, the said plaintiff has not paid said money nor any part thereof, to the damage of defendant ten thousand dollars, which said damages exceed the said supposed damages of plaintiff in said counts mentioned, and out of defendant's said damages he is ready and willing and hereby offers to set off and allow to said plaintiff his aforesaid supposed damages, as by law and the statute in that behalf is provided, &c., and this he is ready to verify, &c., by—

PADDOCK & IDE, *His Att'ys.*

Endorsed: Filed Feb. 11, 1881. W. H. Bradley, cl'k.
2—140

22 Afterwards, to wit, on the twenty-first day of May, 1881, came the plaintiff, by his attorneys, and filed in said clerk's office his replications to the pleas of the defendant in said entitled cause; which said replications are in the words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Illinois.

LEVERETT B. SIDWAY, for the Use of JOHN R. LINDGREN,
vs.
EZEKIEL CLARK.

Replications to Additional Pleas and to Plea of Statute of Limitations First Pleaded.

Similiter to general issue.

1. And now comes the said plaintiff, by his attorneys, and as to the plea of the said defendant to the said first count of the said declaration, and whereof the said defendant hath put himself on the country, the said plaintiff doth the like.

Replication to second plea to first count.

2. And the said plaintiff, for replication to the second plea of the said defendant to the said first count of the said declaration, saith he ought not to be precluded by reason of anything therein contained, because he says that the said several promises and undertakings and each of them were not without consideration, as
23 alleged in said plea, but, on the contrary thereof, the said plaintiff saith that the same were made at the time when, &c., upon and for a good and valuable consideration, and of this the said plaintiff puts himself on the country.

Replication to further plea to first count.

3. And for replication to the further plea of the said defendant to the said first count the said plaintiff saith that he ought not to be precluded by reason of anything therein contained, because he says that said deed was not made to the said defendant as a security for certain monies owing by the said plaintiff to the said defendant, as is in that behalf in the said plea alleged; and of this the said plaintiff puts himself on the country.

Replication to further plea to first & second counts.

4. And for replication to the further plea of the said defendant to the said first and second counts of the said declaration the said plaintiff saith he ought not to be precluded by reason of anything therein contained, because he says he was not at the said several times when, &c., indebted to the said defendant in manner and form as the said defendant hath above thereof in that behalf alleged; and of this the said plaintiff puts himself on the country.

Further replication to last-mentioned plea to first & second counts.

5. And for a further replication, by leave of court, to the said last-mentioned plea to the said first and second counts of
24 the said plaintiff's declaration the said plaintiff saith he ought not to be precluded, &c., because as to so much of the said last-mentioned plea of the said defendant by him above pleaded as relates to the said sum of $5,000 therein alleged to be due and owing from the said plaintiff to the said defendant for money loaned and advanced, and as to so much thereof as relates to the said sum of $5,000, for that much money had and received by the said plaintiff to the use of the defendant, and as to the said sum of $5,000, for that much money alleged to be found due from said plaintiff to said defendant on an account stated, and as to the said sum of $1,000 therein alleged to be due to the said defendant for interest; the said plaintiff saith that the said several supposed debts and causes of set-off in the said last-mentioned plea stated and described did not nor did any or either of them arise or accrue to the said defendant at any time within five years next before the commencement of this suit; and this the said plaintiff is ready to verify, &c., wherefore he prays judgment, &c.

Replication to plea of statute of limitations.

6. And the said plaintiff for replication to the said plea of
25 the said statute of limitations saith he ought not to be precluded by reason thereof, because he says that the said defendant did within five years next before the commencement of this suit undertake and promise in manner and form as he, the said plaintiff, hath above thereof in the said common counts of the said declaration in that behalf alleged; and this he, the said plaintiff, prays may be inquired of by the country, &c.

KALES & SMITH,
Attorneys for said Plaintiff.

Endorsed: Filed May 21, 1881. W. H. Bradley, cl'k.

26 Afterwards, to wit, on the twelfth day of July, in the July term of said court, 1882, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

LEVERETT B. SIDWAY, for the Use of JOHN R. LINDGREN,
vs.
EZEKIEL CLARK. } Assumpsit.

This cause having this day been called and no cause having been shown to the contrary, it is ordered by the court that the same be dismissed at the costs of the plaintiff for want of prosecution, and that execution issue therefor.

27 Afterwards, to wit, on the eighteenth day of July, 1882, there was filed in said clerk's office a stipulation in said entitled cause; which said stipulation is in the words and figures following, to wit:

Stipulation.

Circuit Court of the United States, Northern District of Illinois.

LEVERETT B. SIDWAY, for Use of JOHN R. LINDGREN,
vs.
EZEKIEL CLARK.

The above cause having been dismissed on the general call of the common-law docket on July 12, 1882, it is hereby stipulated that the same may be reinstated on said docket and stand in the same plight and condition as if the same had not been dismissed.

Dated Chicago, July 14, 1882.

F. H. KALES,
Pl'ff's Att'y.
PADDOCK & IDE,
Def't's Att'ys.

Endorsed: Filed July 18, 1882. Wm. H. Bradley, clerk.

28 On the same day, to wit, on the eighteenth day of July, in the July term of said court, 1882, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

LEVERETT B. SIDWAY, Use, &c.,
vs.
EZEKIEL CLARK. } Assumpsit.

By agreement of the parties, as per stipulation filed, it is ordered that the order of dismissal entered herein on Wednesday last be set aside and vacated and the cause reinstated.

29 Afterwards, to wit, on the fourth day of November, 1885, came the defendant, by his attorneys, and filed in said clerk's office his rejoinder to the replication of the plaintiff to the plea of set-off in said entitled cause; which said rejoinder is in the words and figures following, to wit:

Rejoinder.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } ss:

In the Circuit Court for said District, October Term, A. D. 1885.

LEVERETT B. SIDWAY }
vs. }
EZEKIEL CLARK. }

And now comes said defendant and, for rejoinder to the said replication of the statute of limitations fifthly above replied to the plea of set-off pleaded by defendant, says that the causes of action to which the said plea of set-off was pleaded were and each of them was owned by said Sidway at the time of the bar in said replication mentioned and set up and before that time, and this the said defendant is ready to verify, &c.; wherefore he prays judgment, &c.

And for a further rejoinder to said last-named replication
30 said defendant says that the causes of action in that replication mentioned as being barred were and are evidenced by certain contracts in writing signed by said plaintiff, and that the same accrued less than ten years prior to the commencement of this suit, and this he is ready to verify; wherefore he prays judgment, &c.

PADDOCK & ALDIS,
Att'ys for Def't.

Endorsed: Filed Nov. 4, 1885. Wm. H. Bradley, clerk.

31 On the same day, to wit, on the fourth day of November, in the adjourned October term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

LEVERETT B. SIDWAY, for the Use of JOHN R. LINDGREN, }
vs. } Assumpsit.
EZEKIEL CLARK. }

Now come the parties, by their attorneys, and, on motion of the defendant, by his attorney, leave is given him to file a rejoinder to the replication of the plaintiff to the plea of set-off herein; and upon issue joined herein thereupon comes a jury of good and lawful men, to wit, John Kehoe, G. W. Golliday, Joseph H. Abercrombie, James T. Thornton, William Newland, Thomas Dennis, Robert Spafford, L. H. Gilmore, H. P. Stoddart, George Hibben, H. H. Thornton, and Luke P. Barnes, who were all duly elected, tried, and sworn well and truly to try said issue, and, after hearing a part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

32 Afterwards, to wit, on the fifth day of November, in the adjourned October term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

LEVERETT B. SIDWAY, Use of, &c., *vs.* EZEKIEL CLARK. } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and, after hearing the concluding testimony and a part of the arguments of the counsel, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

33 Afterwards, to wit, on the sixth day of November, in the adjourned October term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

LEVERETT B. SIDWAY, Use of, &c., *vs.* EZEKIEL CLARK. } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and, after hearing the concluding arguments of the counsel, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the seventh day of November, in the adjourned October term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

LEVERETT B. SIDWAY, Use of, &c., *vs.* EZEKIEL CLARK. } Assumpsit.

34 Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and, after receiving the instructions of the court, the jury retired to consider of their verdict.

Afterwards, to wit, on the ninth day of November, in the adjourned October term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

LEVERETT B. SIDWAY
vs.
EZEKIEL CLARK. } Assumpsit.

Now come the parties, by their attorneys, and the jury in this behalf empaneled and sworn this day returned into court and reported that they were unable to agree upon a verdict herein; and thereupon it is ordered by the court that they be discharged from the further consideration of the cause.

35 Afterwards, to wit, on the fifteenth day of March, in the adjourned March term of said court, 1887, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

LEVERETT B. SIDWAY, Use of, &c.,
vs.
EZEKIEL CLARK. } Assumpsit.

Now come the parties, by their attorneys, and, not being ready for trial, it is ordered that this cause be continued.

36 Afterwards, to wit, on the twenty-fourth day of March, in the adjourned March term of said court, 1888, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

LEVERETT B. SIDWAY, for the Use of JOHN R. LINDGREN,
vs.
EZEKIEL CLARK. } Assumpsit.

Now come the parties, by their respective attorneys, and upon issue joined herein thereupon comes a jury of good and lawful men, to wit, Rufus King, Daniel Michael, M. P. Garrity, George W. Burchard, M. Ford, James Van Buren, Jacob H. Wolfe, Thomas Hurlston, C. P. Clark, J. S. Bartlett, H. H. Lichtenwalter, and James C. Thomas, who were all duly elected, tried, and sworn well and truly to try said issue, and, after hearing a part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until Monday morning next.

37 Afterwards, to wit, on the twenty-sixth day of March, in the adjourned March term of said court, 1888, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

LEVERETT B. SIDWAY, Use of, &c.,
vs.
EZEKIEL CLARK. } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and, after hearing the concluding evidence and the arguments of the counsel, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning.

Afterwards, to wit, on the twenty-seventh day of March, in the adjourned March term of said court, 1888, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

LEVERETT B. SIDWAY, Use of, &c.,
vs.
EZEKIEL CLARK. } Assumpsit.

38 Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after receiving the instructions of the court the jury retired to consider of their verdict, and by agreement of the parties, by their attorneys, the jury, when they shall have agreed upon a verdict, may sign and seal the same and deliver it to the officer in charge and disperse and meet the court in the morning.

Afterwards, to wit, on the twenty-eighth day of March, in the adjourned March term of said court, 1888, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry to wit:

Order.

LEVERETT B. SIDWAY, Use of, &c.,
vs.
EZEKIEL CLARK. } Assumpsit.

Now come the plaintiff and the defendant, by their attorneys, and the jury in this behalf empaneled and sworn this day returned into court their sealed verdict, wherein they say, We, the jury, find
39 the issue for the plaintiff and assess his damages at six thousand and seven hundred dollars and seventy-five cents; and thereupon the defendant, by his attorney, moves the court for a new trial herein.

40 Afterwards, to wit, on the seventeenth day of May, in the adjourned May term of said court, 1888, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

The following order is entered by direction of Hon. Romanzo Bunn, judge of the district court of the United States for the western district of Wisconsin, to wit:

LEVERETT B. SIDWAY, for the Use of JOHN R. LINDGREN,
vs.
EZEKIEL CLARK. } Assumpsit.

Now comes said plaintiff, by Samuel R. Jewett, Esq., his attorney, and now comes also said defendant, by George L. Paddock, Esq., his attorney, and the court having considered and being now fully advised upon the motion of the defendant for a new trial herein, and intimating an opinion thereon, the plaintiff, by his attorney, and with leave of the court, enters a remittitur of twenty-seven hundred dollars and seventy-five cents upon the verdict entered herein; and thereupon the court overrules said motion for a new trial, awards judg-
41 ment for four thousand dollars damages.

It is thereupon considered and adjudged by the court that said plaintiff do have and recover of said defendant the sum of four thousand dollars, his damages, being the amount of the verdict entered herein less the remittitur aforesaid, together with his costs and charges in this behalf expended, amounting to — dollars and — cents, and that he have execution therefor.

And on motion of the defendant, by his attorney, it is ordered that the issuing of said execution be stayed thirty days, and that the defendant have thirty days to file a bill of exceptions herein.

On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record; which said exceptions are in the words and figures following, to wit:

42 *Bill of Exceptions.*

In the Circuit Court of the United States, Northern District of Illinois.

LEVERETT B. SIDWAY
vs.
EZEKIEL CLARK. } Assumpsit.

Be it remembered that upon the trial of this case the parties filed the following stipulation as to the issues and evidence:

In the United States Circuit Court, Northern District of Illinois.

LEVERETT B. SIDWAY, for Use, &c.,
vs.
EZEKIEL CLARK.

In the above-entitled case it is mutually stipulated that either party may read in evidence all or any part of the testimony and exhibits offered in the chancery case of Clark *vs.* Sidway *et al.*, lately

pending in the same court, without prejudice to the right of offering any other competent and relevent testimony.

CHARLES L. EASTON.
PADDOCK & ALDIS.

43 (Endorsed:) Filed March 24, 1888. Wm. H. Bradley, clerk.

And to maintain the issues on his part the said plaintiff offered in evidence a certain deed of trust, bearing date July 1st, 1870, executed by Charles Cleaver and wife to Benjamin Gallup, filed for record in the office of the recorder of deeds of Cook county, Illinois, July 16th, 1870, recorded in Book 565, page 153. The deed recites the execution by Cleaver of a note payable to his own order, by him endorsed, in the sum of $8,000, due five years from date, with interest at ten per cent. per annum, payable on the first days of January and July in each year, according to coupons attached, each for the sum of $400. To secure the payment of the above principal and coupon notes the deed conveys, with other property, lots seven and eight (7 & 8), fronting westerly on Drexel boulevard eighty (80) feet by one hundred and twenty (120) in depth, in Hyde park, near the city of Chicago. The deed contains a power of sale of the premises at public auction, after notice to be made by the trustee, for the payment of the principal and interest money and costs and charges of sale in case of default in payment by Cleaver of the money secured by the notes.

The plaintiff also offered the principal note of $8,000 mentioned in the trust deed, together with the endorsement thereon, as follows: Charles Cleaver's endor-ement to the order of the National Savings Bank of Concord, New Hampshire; the endorsement of the National Savings bank without recourse to the order of Gallup and Peabody; the endorsement of Gallup & Peabody, as follows:

"July 2, 1875, without recourse pay order of L. B. Sidway. Gallup & Peabody."

Also the following endorsement in the handwriting of the plaintiff:

"Pay Illinois Trust and Savings bank or order. L. B. Sidway and Ezekiel Clark, by L. B. Sidway."

44 "Pay John R. Lindgren or order. Illinois Trust and Savings bank, by Heman G. Powers, president."

The plaintiff further offered in evidence the warranty deed of Charles Cleaver and wife to Leverett B. Sidway, bearing date August 12th, 1872, acknowledged September 15th, 1873, recorded October 16th, 1873, in the same record, conveying to the said Sidway, in consideration as stated of $10,000, said lots seven and eight, and containing the assumption clause following:

"The above-described land sold subject to the provisions of a certain trust deed, bearing date July first (1st), 18870, covering the lots above granted and other property executed by said Cleaver and wife to Benjamin E. Gallup, as trustee, to secure the payment of a certain note of even date herewith for the sum of eight thousand (8,000) dollars, payable in five (5) years from the date thereof, with

interest at ten (10) per cent. per annum, payable semi-annually, for which interest said Cleaver has given his coupon notes, payable on the first days of January and July in each and every year until paid; which said amounts, both principal and interest, said party of the second part, L. B. Sidway, hereby assumes and agrees to pay at maturity as they severally become due and payable, and hold said Cleaver, his heirs and assigns, harmless therefrom and from all the provisions of said deed of trust." This deed contained full covenants of warranty by the grantor, subject only to the trust deed to Gallup. Also a deed from Leverett B. Sidway and wife to Ezekiel Clark, of the city of Iowa City and State of Iowa, bearing date November 23rd, 1875, recorded November 26th, 1875, in said Cook county records, conveying, in consideration, as stated, of the sum of $5,000, an undivided half interest in lots seven and eight above mentioned. The deed contained the covenant of the grantors to the grantee that the grantors had not done nor suffered anything
45 whereby the granted premises were or might be in any manner encumbered or charged, and that the granted premises against all persons lawfully claiming by, through, or under the grantors they would warrant and forever defend.

The deed also, immediately after the description of the property conveyed, contained the following clause: "Subject, however, to a certain encumbrance secured by a trust deed on the above-described premises and other property, dated July 1st, 1870, executed by one Charles Cleaver and Mary Cleaver, his wife, and given to secure the payment of a note of even date therewith, bearing ten (10) per cent. interest, payable semi-annually on the first days of January and July in each year until the principal is fully paid, said note being for the sum of eight thousand ($8,000) dollars, and given by said Charles Cleaver; one-half (½) of which said note, with the interest thereon accrued, accruing, and to accrue from and since the twelfth (12th) day of August, A. D. 1872, the said Ezekiel Clark hereby assumes and agrees to pay and save the said Sidway harmless therefrom, as well as from one-half (½) of any further liability he, the said Sidway, may be under, by, and through any or all of the provisions in said above-mentioned trust deed contained."

The plaintiff further offered his own testimony tending to prove that he had known the defendant since 1861; that he knew the property mentioned in the foregoing deeds; that the said property was purchased by plaintiff and defendant upon joint account from Charles Cleaver, on or about August 12th, 1872, in equal shares; that Cleaver executed his deed to plaintiff on or about September 15th, 1873; that on or about the 18th of October, 1872, the plaintiff drew upon the defendant, at Iowa City, a draft of $2,031.40, which was applied by plaintiff upon the purchase-money of said premises, making, with the Cleaver encumbrance, the entire
46 purchase-money thereof, and further offered evidence tending to show that by the understanding between the plaintiff and the defendant as to such purchase the plaintiff was to pay interest upon the encumbrance and assessments and taxes upon the land, and from time to time after the first year render an account of such

disbursements to the defendant; that after efforts to sell the land upon the market it became evident, in the fall of the year 1875, that they would have to continue to hold the property for a considerable time, and that defendant requested the plaintiff to give him a deed of an undivided half, and that plaintiff prepared, recorded at Chicago, and forwarded to the defendant such deed accordingly; that July 2nd, 1875, the plaintiff arranged with the Illinois Trust and Savings bank to take up the Cleaver note and trust deed and hold it as an investment, which was done, as collateral to the note of the plaintiff to that bank, payable upon demand, and bearing that date, in the sum of $8,000, with interest at eight per cent.; that the collateral, the Cleaver note and trust deed, never came into plaintiff's hands, and that the demand note so given by — to the bank contained the following clause:

"There has been pledged by the undersigned, the Illinois Trust and Savings bank, as collateral security for the foregoing note, as well as for all other sums due or owing or to become due or owing from the undersigned or either of them to the said Illinois Trust and Savings bank, the following-described property, viz., note Charles Cleaver, $8,000, secured by trust deed herewith."

Upon a blank space of which in plaintiff's hand was the following:

"This is for joint account of myself and Ezekiel Clark, Iowa City Iowa.

"L. B. SIDWAY.

"And full power and authority is hereby given the said Illinois Trust and Savings bank or its assigns, in its discretion, to sell the said collateral security at public or private sale," &c.

(Signed) L. B. SIDWAY.

47 And with the said demand note the plaintiff offered evidence tending to show that the Illinois Trust and Savings bank, as holder thereof on the 10th of March, 1879, by the power of sale therein contained, sold the collaterals therein mentioned to John R. Lingren for two thousand dollars ($2,000) and credited the net proceeds of sale, nineteen hundred and forty-four dollars ($1,944), upon the principal and interest of said demand note, being $9,028.67, leaving a balance due upon said demand note, March 10th, 1879, of $7,138.67, the interest upon said demand note at eight per cent. having been paid to July 1st, 1877.

Plaintiff further offered evidence tending to show that the defendant came to Chicago after the letter of plaintiff to defendant of October 15th, 1872, and indicated that he would join plaintiff in the purchase of the said land; and the plaintiff further offered evidence tending to show that the amount of a draft upon defendant drawn by plaintiff, paid by the defendant, namely $2,021.40, was subsequently treated by the plaintiff and defendant as a first payment upon said purchase; and further offered evidence that the plaintiff made the following payments upon account of interest and taxes relating to said land:

Interest coupon of Cleaver note paid May 1, '73	$337 47
" " " " " " July 1, '73	400 00
" " " " " " Jan'y 1, '74	400 00
" " " " " " July 1, '74	400 00
" " " " " " Jan'y 1, '75	400 00
" " " " " " July 1, '75	400 00
" " " " " " Jan'y 1, '76	400 00
Cash paid by Sidway, park assessment, Oct. 6, '74	73 76
" " " " " " Feb. 27, '75	74 11
" " " " State & Co. tax, Oct. 6, '74	70 98
" " " " " " " Aug. 7, '75	58 40
	$3,014 72

48 And further offered *in* evidence tending to show a rendition of account in writing to defendant, stating such payments and such credit of $2,021.40 by letter to the said defendant on or about January 13, 1876; and, further, the plaintiff offered evidence tending to show that on or about the first of January, 1877, the plaintiff rendered to defendant, by letter to Iowa City, Iowa, a further statement of account, showing the foregoing and additional items of cash disbursed by the plaintiff, with charges and credits of interest, and showing a balance due plaintiff from defendant at that date of $718.08, the same being substantially as follows:

		Int. at 8 per cent.
Cash p'd by Sidway, int. coupon, Jan'y 1, '73	$337 47, 4 yrs.	$108 00
" " " " " " July 1, '73	400 00, 3 y. 6 m.	112 00
" " " " " " Jan'y 1, '74	400 00, 3 yrs.	96 00
" " " " " " July 1, '74	400 00, 2 y. 6 m.	80 00
" " " " " " Jan'y 1, '75	400 00, 2 yrs.	64 00
" " " " " " July 1, '75	400 00, 1 y. 6 m.	48 00
" " " " " " Jan'y 1, '76	400 00, 1 y	32 00
" " " park assessment, Oct. 6, '74	73 76, 2 y. 2 m. 26 d.	13 20
" " " " " Feb'y 27, '75	74 11, 1 y. 1 m. 5 d.	10 94
" " " State & Co. tax, Oct. 6, '74	70 98, 2 y. 2 m. 21 d.	12 75
" " " " " " " Aug. 7, '75	58 40, 1 y. 4 m. 35 d.	6 08
" " " int., Jan'y 1, '77	400 00	
" " " State, Co., & park tax, 1876	139 94	
	$3,554 66	$582 97
	582 97	
	$4,137 63	

49 Cash paid by Clark:

First payment, Oct. 18, 1872	$2,021 40	
Int. on above to Jan. 1, '87, at 8%	680 07	
	2,701 47	
	$1,436 16	
Balance due Sidway from Clark, one-half of	$1,436 16	$718 08

Plaintiff further offered evidence tending to show on or about the first of January, 1878, the plaintiff rendered to the defendant a further account, in writing, by letter to defendant at Iowa City, embracing the foregoing items and others, which statement was received by the defendant, and was substantially as follows:

		Interest at eight per cent.	
Cash p'd by Sidway, int. coupon, Jan. 1, '73	$337 47, 5 yrs.	$134 90
" " " " " " July 1, '73	400 00, 4½ yrs.	144 09
" " " " " " Jan. 1, '74	400 00, 4 "	128 00
" " " " " " July 1, '74	400 00, 3½ "	112 00
" " " " " " Jan. 1, '75	400 00, 3 yrs.	96 00
" " " " " " July 1, '75	400 00, 2½ "	80 00
" " " " " " Jan. 1, '76	400 00, 2 yrs.	64 00
" " " " park assess't, Oct. 6, '74	73 76, 3 yrs. 2 m. 25d.	19 05
" " " " " " Feb. 27, '75	74 11, 2 " 10 m. 4 d.	16 82
" " " " State & Co. tax, Oct. 6, '74	70 98, 3 " 2 m. 25 d.	18 38
" " " " " " " " Aug. 7, '75	58 40, 2 "4 m. 26 d.	11 21
" " " " int., July 1, '76	400 00, 1½ yrs.	48 00
" " " " " Jan. 1, '77	400 00, 1 yr.	32 00
" " " " " July 1, '77	320 00, 6 mos.	12 80
	$4,134 72	$917 25
		4,134 72
		$5,051 97
50		$5,051 97
Cash paid by Clark Oct. 18, 1872		$2,021 40
Int., 5 yrs. 2 mos. 13 days, at 8 per cent.		841 35
Cash paid by Clark Dec. 11, 1877		450 00
Int., 21 days		2 10
		$3,314 85
Bal. due Sidway, ½ of $1,727.12		$868 56

And it further appeared in evidence that each of said statements of account so rendered was headed substantially as follows:

"Statement of account of purchase of lots 7 and 8, Cleaverville, Cook county, Illinois, on joint account and equal shares, for L. B. Sidway, Chicago, and Ezekiel Clark, Iowa City, Iowa." In the handwriting of the plaintiff correspondence between the parties extending through the years 1872, 1873, 1874, 1875, 1876, & 1877 & 1878 was introduced in evidence by plaintiff tending to show that the parties treated with each other upon the basis of a joint ownership of the Cleaver lots and conferred with each other about the sale of them; and it appeared in evidence also, without contradiction, that in February, 1875, the plaintiff purchased of the defendant stock in a Chicago bank & paid therefor in cash about $4,000, & that defendant from time to time requested the assistance of plaintiff in borrowing money for use in his business in the State of Iowa. Of the letters above referred to there are set out in full the following from the defendant to the plaintiff:

1. IOWA CITY, *Oct. 18th*, 1872.

Hon. L. B. Sidway, Chicago, Ill.:

I am in rec'pt of your favor of the 15th inst., on my return
51 home from an absence of a few days. I am sorry to say money matters are very close here. We have increased our capital in b'k, and I have taken the larger portion of increase. I have also taken stock in a new savings b'k since I have seen you; will be down soon, and if possible make arrangement to subserve our mutual interests.

Truly yours, E. CLARK.

2. IOWA CITY, *Oct.* 19*th*, 1872.

L. B. Sidway, Esq., Chicago, Ill.:

I have remitted for your check on me as you requested; hope to see you soon.

Very truly yours, E. CLARK.

3. IOWA CITY, *Dec.* 17*th*, 1872.

L. B. Sidway, Esqr., Chicago, Ill.

DEAR SIR: I procured a loan from Mr. P. P. Freeman to pay draft you drew on me, which he would like to have now. Will I draw on you for amount?

Truly yours, E. CLARK.

After you and I had talk about purchasing property on joint account I wrote you that we had increased our bank stock, and I also took other bank stocks and invested in coal interests largely, which make me, with the stringency of the times, scarce of funds at this time.

52 4. IOWA CITY, *April* 26*th*, 1873.

Hon. L. B. Sidway, Chicago, Ill.:

In relation to bank you are organizing I would — some of the stock if I can arrange to raise the money to take it; will come down when deposition is taken or before and confer with you on the subject.

Truly yours, E. CLARK.

5. IOWA CITY, *Jan'y* 22*nd*, 1874.

L. B. Sidway, p't, Chicago, Ill.

ESTEEMED SIR: I have been making purchases in coal lands and would like to realize on b'k stock in your bank. What would it bring now?

Truly yours, E. CLARK.

6. IOWA CITY, *Aug.* 14*th*, 1874.

Hon. L. B. Sidway, Chicago, Ill.:

I have on hand a large and very important coal interest and will need more money that I can conveniently raise. If you will take an interest in the purchase I will guarantee it one of the best speculations that has been presented in the West. If you should think favorable of it come here and I will explain and show you everything about it; all expenses paid by me if not satisfactory; everything about it solid and substantial; coal developed; title can be made perfect; a good thing and all right every way.

Truly yours, E. CLARK.

53 7. IOWA CITY, *Sept.* 9*th*, 1874.

L. B. Sidway, Esq., Chicago, Ill.:

I am in receipt of your favor of the 5th inst. I will be obliged to convert my interests in Chicago to hold the coal interests with

which I am connected. What is the condition of the lot purchased and what could I realize immediately for it; also, what could I realize on b'k stock?

Very truly your friend, E. CLARK.

9. IOWA CITY, *Jan'y 12th*, 1875.

L. B. Sidway, Esq., Chicago, Ill.

ESTEEMED FRIEND: Will you be kind enough to sell my bank stock in trust and savings bank? My son has been unfortunate in live stock and produce operations and is very much embarrassed. I want to pay his debt without changing my bank interest in the Iowa City National bank.

Truly yours, E. CLARK, *P't.*

9. FEBRUARY 8, 1875.

Hon. L. B. Sidway, Chicago, Ill.

DEAR FRIEND: I have bought a large coal interest and need money. Can you advance me $2,500 on property security, security in Chicago? It will be a great favor, and I will take pleasure in accommodating you when I can do so.

Truly yours, E. CLARK.

Write me at Des Moines. I will be here for some time.

"E. C."

54 10. IOWA CITY, *Jan'y 26th*, 1877.

Hon. L. B. Sidway, Chicago, Ill.

DEAR SIR: When I consented to have a deed made to Chicago property it was with the assurance that you could get my money out with a profit at any time, and that you would take care of it until it was sold without drawing on me for any further payments. I now want you to sell my interest for what you can get and forward me proceeds whether it pays out or not.

Truly yours, E. CLARK.

11. IOWA CITY, *July 11th*, 1877.

L. B. Sidway, Esq., Chicago, Ill.:

In regard to sale of property I have relied on your judgment in regard to same. You had better not sell for a time, and I will see you and determine whether to sell or hold.

Truly yours, E. CLARK.

12. IOWA CITY, *Jan'y 5th*, 1878.

Hon. L. B. Sidway, Chicago, Ill.

DEAR SIR: Please do not make any drafts on me. I will be in Chicago soon. I though- you had an offer for the lot that would let us out. If so, sell; don't draw.

Truly yours, E. CLARK.

55 13. MAY 15TH, 1878.

E. Clark, Esq., Iowa City, Iowa.

DEAR SIR: Upon my return from California I learn that you have had a conversation with Mr. Leiter, either saying direct or leading him to infer that you denied the responsibility of one-half the $8,000 and interest due the bank on Drexel boul. purchase.

I can hardly understand any reason for your assuming such a position as leaving out all moral obligations. Your letters to me and acceptance of the deed, even as stated to Mr. Leiter, renders you liable, and these facts will be at the service of the bank; but, in any event, this is a matter of business which had best be finally understood now.

Do you or do you not admit your responsibility for one-half part? Please give me your answer direct, upon receipt of which the bank will act as may appear best.

Yours truly, L. B. SIDWAY.

And, further, plaintiff offered evidence tending to show that he and defendant consulted together at Chicago at various times during the years 1877 and 1878 as to the best methods of selling the said property; and the plaintiff further stated in evidence, upon cross-examination, substantially that the bank demanded payment of their demand note in November or December, 1877; that the plaintiff was president of the Illinois Trust and Savings bank at the time he purchased the property from Cleaver and at the time the bank purchased the Cleaver note and trust deed as collateral to the demand note of plaintiff to the bank; at the latter time the officers of the bank were aware of plaintiff's assumption of the Cleaver trust deed contained in the deed of Cleaver to the plaintiff; that at the time of the purchase by plaintiff from
56 Cleaver the plaintiff was a member of the board of South Parck commissioners, which commission had complete control over improvements of land included within the parks and boulevard systems, including Drexel boulevard aforesaid.

The plaintiff further offered testimony tending to show that the defendant came to Chicago about sixty days, more or less, after October 18th, 1872, and there met the plaintiff and had a conference with respect to the purchase of the property; that the plaintiff then gave him his views upon the property and its value, and that they then agreed to hold it jointly, plaintiff agreeing to pay the interest, taxes, and other expenses up to an amount equivalent to the amount which plaintiff had advanced. The plaintiff further testified in substance as follows:

"I severed my connection with the Illinois Trust and Savings Company in December, 1877. The bank purchased this Cleaver mortgage, which was a lien on the property, as an investment. The bank at the time was buying good mortgages a good deal."

The plaintiff further offered his own evidence to the effect that he afterwards took up and paid his demand note to the Illinois Trust and Savings bank in the sum of $7,138.60, and also said Cleaver note and trust deed, and that his claim against the defendant upon

that transaction and upon the items of account mentioned in the statements of account rendered defendant by mail, as aforesaid, was computed by him, reckoning interest at six per cent., at $6,700.75. The plaintiff further gave evidence tending to show that although the defendant was at first undecided about taking the half interest in the lots, yet he afterwards consented and agreed to do so, and that the deed of November, 1875, from plaintiff to defendant of an undivided one-half of the lots was made at defendant's request
57 when it was understood that they would be compelled to carry the property longer than was at first expected in order to realize the amount invested; also that plaintiff was at all times able to raise money for payment of his debts, and at times during the year above named had large sums of money on deposit in bank to his credit.

And be it further remembered that upon said trial the defendant offered the evidence of John J. Mitchell, president of the Illinois Trust and Savings bank, and that the evidence of said Mitchell tended to prove that on or about the 2nd day of July, 1875, the Illinois Trust and Savings bank, of which the witness was then an officer, became the assignee by endorsement of the Cleaver note and mortgage as collateral security to the demand note of the plaintiff of that date for the sum of $8,000 offered in evidence, the consideration of which demand note was money loaned said plaintiff; that upon failure of Sidway to pay the demand note the bank transferred the collateral to John R. Lindgren, and that afterwards Lindgren was reimbursed by the bank for the amount of his check given for the Cleaver note and mortgage; that after the sale of the $8,000 Cleaver note to Lindgren the balance of $6,000 and some hundred dollars was left unpaid on the note of Sidway, and Sidway owed the bank over $10,000, exclusive of the demand note; that the object of the sale to Lindgren of the collateral was to get the property back where the bank could get the difference on its money; that a quitclaim deed was made by Lindgren to the witness in trust for the bank after the trustee's sale and deed to Lindgren; that the transfer to Lindgren and the trustee's sale by Clark and conveyance back by Lindgren to John J. Mitchell were had in pursuance of the object and plan of effecting a satisfaction or a partial satisfaction of the claim of the bank against Sidway and Clark.

58 It further appeared in substance by the testimony of said Mitchell on behalf of the defendant that the witness, as president of the Illinois Trust and Savings bank, held the real estate in controversy under his quitclaim deed from Lindgren up to the 15th of June, 1883, or thereabouts; that at that date the bank was also the holder of the Cleaver note and deed of trust and of the demand note of the plaintiff aforesaid; that at the last-mentioned date the property was sold by the bank and conveyed by the witness as trustee for the bank as a part of a settlement between the bank and Sidway; that Sidway was then indebted to the bank in several amounts, including the $8,000 loan, to about $14,000 or $16,000; that by the settlement Sidway paid the bank $5,000.00 cash, gave his own note for about $9,200, and a note of Mrs. Woodruff for

about $2,000, and the bank turned over to him the demand and collateral papers, and at his request conveyed the property to his brother-in-law, Dr. Martin, which paid the original demand note, which was unpaid up to that time; that all the business of the settlement was transacted by Sidway, Dr. Martin having nothing to do with the witness concerning it, and it appeared in evidence that said property was subsequently sold for $14,000 to $16,000, out of which back-tax claims and penalties to about $3,000 were deducted.

And, further, the defendant offered his own evidence that he resided at Iowa City, Iowa, and had so resided for over thirty-five years; that he had been a banker about twenty-five years; had never owned or dealt in real estate in Chicago nor become familiar with the modes of transferring or encumbering real estate in Chicago or elsewhere in Illinois; had known the plaintiff over twenty years; saw him at Chicago in 1872; that plaintiff was inclined to
59 think his official connection with the South Park commissioners would enable him to make money by the purchase of real estate, and advised defendant to take an interest in real estate with him; that defendant declined to make any arrangement with plaintiff to operate in real estate, as he was not engaged in that business and did not wish to be; that in the ordinary course of mail defendant received a letter written and signed by the plaintiff and mailed to the defendant at Iowa City, bearing date October 15th, 1872, substantially as follows:

"THE STATE SAVINGS INSTITUTION,
"CHICAGO, *Oct.* 15, 1872.

"Mr. Clark, Iowa City, Iowa.

"DEAR SIR: I have just bought a lot on Drexel boulevard, 80 ft. front, 125 ft. deep to an alley. The improvements in front and about it are fixed and the contractors have begun work. I consider it an excellent purchase for a permanent thing, as well as being well located for a quick turn if desirable to do so.

"The location is near the Ills. Central road, one block from horse cars, and within twenty days there will be a fine drive every foot of the way to the centre of the city.

"The entire cost will be about $10,500, $2,500 cash, and subject to a mortgage on it for $8,000, which I understand can be paid. What I propose is to have it deeded to you and draw on you for $2,500, and when I pay my half you can quitclaim to me. If I hear nothing to the contrary I will draw on you in a day or two for what the exact amount may be. I was expecting to have received $30,000 sixty days ago from first-rate parties, but have not got a dollar of it yet. I think there will be some good trades to be had here late in the winter, and if you are over here during
60 the fall I want to show you around again. Where there is so much trading there are always persons getting over their depth that are compelled to sell, and those are the chances I want to look for.

"Yours truly, L. B. SIDWAY."

The witness further testified in substance that upon receipt of this letter he answered, declining the proposition, and did not accept the proposition in any other way, and further that in due course of mail (which was one day) he received from plaintiff by mail, at Iowa City, the letter of plaintiff, dated Chicago, October 18, 1872, substantially as follows:

"Mr. Clark.

"DEAR SIR: I will draw to-day for $2,031.40 as first payment on Drexel boulevard purchase, as per my letter of October 15th. The amount to be paid is, as you will see, nearly $500 less than I supposed. The deed will be made direct to you.

"Yours in haste, L. B. SIDWAY."

"P. S.—There will be no notes given.

S."

The witness further stated that he received in due course the draft of plaintiff upon himself, dated Chicago, October 18th, 1872, payable at sight to the order of the drawer for $2,031.40, endorsed by plaintiff in blank and by the State Savings Institution of Chicago to the Iowa National bank, at Iowa City, for collection; that after having written to plaintiff a letter declining to go into the purchase defendant received from plaintiff a telegraphic despatch by him signed in substance as follows:

"CHICAGO, 19 *October*, 1872.

To Ezekiel Clark.

Letter received. I made draft yesterday. Please protect it and I will arrange it some way with you. Will write."

L. B. SIDWAY."

61 Witness further testified in substance that after receipt of this telegram and further letters from plaintiff on the subject, asking him to protect the draft from protest, defendant paid the draft in full, relying on the telegram and the promise of the plaintiff to arrange it to his satisfaction.

And the defendant further offered in evidence a letter of said plaintiff to the defendant, received by the defendant at Iowa City in due course of mail, bearing date Chicago, December 26th, 1872, substantially as follows:

"Mr. Clark.

"DEAR SIR: Yours was duly received, and I have delayed answering, hoping to get some money due me, which I now see I will not get at present. I have $30,000 due that should have been paid some time since, which I will have to carry one to two months.

"Now, if you can add interest and draw at sixty days it would suit me first rate, but if you can't I will, of course, pay any time.

"I am sorry you don't go in on this thing, for the improvements are going on. The money is appropriated, and I am making the

contracts. There will be a big profit in the trade, and the developement will be only in the summer.

"Yours, &c., L. B. SIDWAY."

And the defendant, further to maintain the issues on his part, offered in evidence a letter from the plaintiff to the defendant, dated Chicago, May 22nd, 1875, in substance as follows:

"Office of the Illinois Trust & Savings bank, 122 and 124 Clark street.

"CHICAGO, *May 22nd*, 1875.

"Mr. E. Clark, Iowa City, Iowa.

"DEAR SIR: Having heard nothing from you regarding the lots since mine of Dec., '72, I fully supposed the purchase was to stand as originally proposed. It would be particularly inconvenient for me to make any change just (now).

62 "As you will probably find time to come over during early summer, let matters rest until then, and I think you will come to a conclusion very soon after looking over the ground. At least we will close in some way definitely. Write a few days before you come, so that I will be at home.

"Yours, &c., L. B. SIDWAY."

Defendant further gave evidence tending to show that prior to the receipt of plaintiff's first letter of October 15th, 1872, defendant did not know that plaintiff was interested in this lot; had never heard about any particular property; did not ever go in on that purchase with plaintiff; did not afterwards make any new arrangement by which defendant became a partner in that purchase; did not understand it so and don't think plaintiff understood it so at the time plaintiff sent what seems to be a deed; saw plaintiff after December 26th, 1872, in Chicago. On those occasions defendant talked about getting payment of his advances to plaintiff, and plaintiff stated generally that times were harder; that it was difficult to sell property, but he had an opportunity to sell, and as soon as he sold some property plaintiff would pay defendant what he owed him. At one time before plaintiff sent the paper he proposed to send defendant something in the shape of security for the money he owed him. Defendant replied it would not be objectionable to have security; that in none of the conversations with defendant did plaintiff suggest to defendant the assuming of one-half of the Cleaver trust deed or mortgage or any mortgage on that property; that defendant never knew about the encumbrance; that any proposition made by the plaintiff and accepted by the defendant was simply as security for the defendant's money paid on the draft, as defendant understood it; that defendant said to plaintiff that at their last interview before sending the deed from plaintiff to defendant that the defend-

63 ant did not wish to operate in the property, and when plaintiff could pay him the money he might do so, and tending to show that defendant never had any conversation with plaintiff to the effect that he would become an owner of the property with plain-

tiff or with anybody; that the deed bearing date November 23, 1875, is the deed that came to the bank after defendant's conversation with Sidway; that defendant did not read it through, and never knew it held any obligation to do anything in the way of paying until so informed by Mr. Leiter in 1877, when defendant repudiated such obligation.

Witness further gave evidence tending to show that at the time the deed came to the bank his son-in-law, J. N. Coldren, was in charge as cashier and usually opened witness' letters; that the attention of witness to the clause in the deed from Sidway concerning encumbrances was not called until after October 4th, 1877, and that defendant never assumed such encumbrances.

Defendant further testified in substance that he came to Chicago in a day or two after having learned that the maker of the deed had suggested to Mr. Leiter that defendant was liable on the deed; saw Mr. Leiter, who was one of the directors of the Illinois Trust and Savings bank, and called his attention to the matter, and informed Mr. Leiter that there was no understanding between the defendant and the plaintiff by which the defendant was to pay anything on the encumbrance.

The witness further gave evidence tending to show that the item of $450 mentioned in one of the statements rendered by plaintiff as paid by Clark December 11, 1877, was paid by Mr. Coldren, the cashier, during the absence of defendant, upon the credit of Sidway, the drawer of the draft, in due course of business, and was not intended by defendant as a payment upon the land purchase, as indi-
64 cated by Sidway in such statement, and that both the draft of $2,021.40 and the draft of $450 were drawn by plaintiff without authority from defendant, and constituted advances to plaintiff which remained due and unpaid; that the deed sent defendant by plaintiff was not recorded by defendant, but had been recorded by plaintiff before sending it; and that defendant gave no authority to Sidway or any one to record it; that defendant had not heard, prior to the commencement of this litigation, that the Cleaver note had been taken up, nor that the Gallup trust deed had been foreclosed; never found that out until after the commencement of the present suit; had never heard of Cleaver or Gallup until then; that defendant's pecuniary position in July, 1879, was good; could have raised $8,000 or $9,000 or $50,000 if necessary; had no notice that in 1879 the land was to be sold under foreclosure; never heard of it until the suit commenced; had never, prior to receipt of the deed from Sidway, seen any deed of the land to Sidway; had never seen it since or known the provisions and descriptions in that deed; that there was no other consideration for the deed from plaintiff to defendant than the pre-existing indebtedness from plaintiff to defendant.

And defendant further offered in evidence two letters of plaintiff to defendant, of Jan'y 5, 1877, and December 18, 1877, as follows, viz:

CHICAGO, *Jan'y 5th*, 1877.

E. Clark, Esq., Iowa City, Iowa.

DEAR SIR: I enclose herewith account of Cleaver purchase to this day. I made an account last July and supposed it had been sent you, but find that it was covered up with a lot of papers and was not sent. I have no account of this further than the vouchers, and as I am in special need of the money just now I will make 6
65 months' draft on you for $718.08, which will balance the account. There has been quite extensive improvements all around this property, and when spring opens we will, if you think best, sell it, although I am still confident of profit if held for a general revival of buisness. We don't get any loans from your people.

Yours truly, L. B. SIDWAY.

P. S.—If not convenient to pay draft when due I will arrange it.

Yours, &c., L. B. S.

CHICAGO, *Dec. 18th*, 1877.

E. Clark, Esq., Iowa City, Iowa.

DEAR SIR: A few days ago I was told that you had written Mr. Leiter that you had paid me your part of the encumbrance on the Drexel boulevard property. A little later I asked Mr. Leiter about it, and was told that your letter was indefinite, but left such an impression on his mind. Not having seen the letter, I am ignorant of its contents further than as stated. The circumstance has, however, put me in such an attitude as to render a settlement necessary by Jan'y 1st. I enclose statement made up to last of this year, and on the first will draw for the amount, including one-half the interest due Jan'y 1st—$160; will try and arrange to draw on four months, so as to give time for selling the property, and, without I hear from you to the contrary, will sell for $10,000. In fact, I am now negotiating with a party who will probably take it during Jan'y for $10,000 cash. It is a pity to sell such a piece of property after carrying it so long and when there is so much doing around it, but it will probably be better to do so unless we divide it.

Yours truly, L. B. SIDWAY.

66 P. S.—I will probably go to Europe some time between 1st of Feb'y and 1st of May on buisness. The matter of which I told you about my friends appear to be very anxious to invest money in Ills. and Iowa. S.

Defendant further offered evidence tending to show that he had never received from plaintiff the first-mentioned statement of account alluded to by plaintiff, and stated to have been sent on or about January 13th, 1876; that the defendant returned without acceptance to plaintiff the draft for $718.08 mentioned in the statement of plaintiff to defendant of January 1st, 1877; also the draft of $868.56 of January, 1878, if the same was ever drawn; and, further, that the plaintiff never had authority to sign on the back of the Cleaver note "E. Clark, by L. B. Sidway," or authority to sign defendant's name to any paper, and that the only unsettled matters

between him and plaintiff were the two unpaid drafts of $2,041.40 and $450.00, above referred to.

The defendant further offered the testimony of J. N. COLDREN, tending to prove the following facts: That he was the cashier of the Iowa City National bank, and had been for the past sixteen years; that he had resided twenty-eight years in Iowa City, was the defendant's son-in-law, and attended to his correspondence and papers; that he was present at the bank when the deed offered in evidence from L. B. Sidway and wife to defendant was received with the other mail of the defendant; that witness opened the envelope and informed the defendant that it contained a deed. Counsel for defendant thereupon asked the witness to state to the jury what, if anything, was said by the defendant upon the opening of the envelope and the exhibition to him by the witness of its contents, to which the counsel for the plaintiff then and there objected, but the court overruled such objection and allowed the witness to answer;

67 whereupon the plaintiff then and there excepted, the court stating that the evidence might go to the jury for what it was worth; and thereupon the witness stated, in substance, that upon opening the envelope he informed the defendant that it contained a deed to the defendant from L. B. Sidway and wife; whereupon the defendant remarked that the deed was some collateral that Mr. Sidway was to furnish, and without reading the deed or looking at it left the same in the possession of the witness, in whose possession and control it remained at the bank, without further examination, among the other papers of defendant. Witness stated that he was defendant's son-in-law.

The further testimony of said Coldren tended to show the refusal on the part of defendant to accept or pay drafts drawn by plaintiff for the balances claimed in the accounts received by defendant from plaintiff in 1877 and 1878, and to show that the draft of $450 was paid during the absence of defendant, and on or about December 11th, 1877, upon request of plaintiff and his previous promise in writing to protect the draft. The witness further stated that defendant did not read the deed from Sidway so left in his charge at the bank until after his attention had been called to it by the claim made by the bank that the deed contained a liability on the part of defendant.

Defendant further offered the testimony of JOHN R. LINDGREN, substantially as follows:

Have resided at Evanston since 1875; engaged in insurance business at Chicago; have known John J. Mitchell, L. B. Sidway, and the Illinois Trust and Savings bank for over ten years; do not remember distinctly about the $8,000 Cleaver note; remember purchasing such a note at a sale, I think, in 1879; gave a check for it; never examined the title to the land. Mr. Mitchell said it was a

68 good note, and I went over and bid it in; gave my check for it on the Illinois Trust and Savings bank, where I had my account; did not make or lose by the transaction; came out even. The further testimony of the witness, after the reading to

him of the trustee's deed to himself, tended to show he did not remember whether he did or did not buy the land at the trustee's sale, or whether he received or not a trustee's deed, or whether he made any conveyance to John J. Mitchell, but that he recollected paying a check and getting his money back. The witness further stated: "I have no interest in a suit at law brought in this court against Ezekiel Clark; did not cause the suit to be brought, or employ the attorneys to bring it, or take any steps to have it brought. I don't know anything about such a suit, nor to whom that suit belongs or for whose use it is brought. I do not know anything about the suit entitled Leverett B. Sidway, for the use of John R. Lindgren, *vs.* Ezekiel Clark."

The defendant further offered the testimony of ALFRED BARTOW, a loan agent familiar with the values near the property in question since 1875, who had resided over eight years near the property in question, which testimony tended to show that the property was worth, in 1879, from $85 to $100 per foot, being from $6,800 to $8,000 for the 80 feet frontage.

The defendant further offered the evidence of CHARLES CLEAVER, who had resided in Chicago over forty-seven years and who was the grantor of the plaintiff. The testimony of this witness tended to show that he was well acquainted with the property purchased by the plaintiff, namely, lots 7 and 8, in subdivision of lots 5, 6, &c., in block 6, Cleaverville; that the same was sold for $10,000, part cash and plaintiff assuming the mortgage of $8,000; that the witness and plaintiff, at no time after conveyance by witness to the plaintiff, made any other or different contract or arrangement as to the note of witness or the encumbrance other than that stated in the deed of the witness to the plaintiff.

69 And, further, to maintain the issues on his part, the defendant offered in evidence the deed by Illinois Trust and Savings bank to John R. Lindgren, dated March 10th, 1879, acknowledged March 12th, 1879, before John J. Mitchell, notary public, and recorded in Cook county records September 11th, 1879, this deed reciting the making by Leverett B. Sidway of his note on demand for $8,000, with interest at eight per cent., payable to the order of the party of the first part; the pledge by said Sidway to the party of the first part of the note of Charles Cleaver for $8,000, dated July 1st, 1870, and assigned by endorsement to said Sidway and secured by a certain trust deed on real estate filed for record in the recorder's office of Cook county on the 16th day of July, 1870, and recorded in Book 565 of Deeds, at page 153, and further reciting the giving by Sidway of a power to the party of the first part in its discretion to sell the said security, to wit, the said note made by the said Cleaver and the said mortgage deed of trust to secure the same, and that afterwards, on the 22nd of February, 1879, said Sidway failed to pay said note so made by him, — the party of the first part did appoint said collateral security to be sold on the 10th day of March, 1879, at the north door of the Chamber of Commerce building, &c., and did then and there cause three weeks' notice of the said

sale to be first given, &c.; and thereupon, afterwards, at the time and place appointed in said notice, the said party of the first part did offer for sale the said collateral security to the highest bidder for cash; and thereupon, the said party of the second part being the highest bidder and bidding therefor the sum of $2,000, the said party of the first part thereupon did sell the same to said party of the second part for the price aforesaid, &c; witnessed that the said party of the first part, in consideration of the premises and the said sum of $2,000, bargained, sold, assigned, and set over to said
70 party of the second part, his heirs and assigns, both the said promissory note made by the said Cleaver and also the said mortgage deed of trust securing the same, and assigned the said note to said party of the second part by endorsement thereon.

There was further offered in evidence the trustee's deed made by Benjamin E. Gallup, as trustee, to John R. Lindgren, dated July 15th, 1879, acknowledged July 19th, 1879, recorded September 11th, 1879, in Book 890 of Records, at page 609, the material parts whereof are as follows: The deed, after reciting the execution by Cleaver and wife of their trust deed of July 1st, 1870, above referred to, to secure the principal promissory note of Cleaver of $8,000, of that date therein mentioned; the powers of sale upon default therein mentioned; that a default occurred on the 20th of June, 1879, which had continued from the first of July, 1875; that no part of said note had been paid; that thereupon the legal holder of said note made application to said party of the first part, as such trustee as aforesaid, to sell and dispose of said premises under the power in said deed of trust contained; and thereupon said party of the first part appointed the said premises to be sold on the 15th day of July, 1879, at the north door, &c., and then and there caused twenty days' notice of the sale, &c.; and on the 15th of July, 1879, &c., the said party of the first party did offer for sale the said premises, and, the said party of the second part being the highest and best bidder and bidding the sum of $2,500, the said party of the first part did sell the same to the said party of the second part, which sum, after deducting the expense of the sale, was then and there applied on said indebtedness, conveyed lots 7 and 8 aforesaid to the party of the second part in fee simple. Defendant further offered a quitclaim deed from John R. Lindgren to John J. Mitchell,
71 dated September 25th, 1879, recorded September 26th, 1879, in Book 935 of Cook County Records, at page 176, quitclaiming, in consideration of one dollar, to the said John J. Mitchell lots 7 and 8 aforesaid.

And it was admitted by counsel for the parties that this suit was begun by plaintiff October 13, 1880.

And be it further remembered that the foregoing was all the evidence offered upon the trial of said cause by either party.

And be it further remembered that upon the trial of the said case and before the jury had retired to consider their verdict the defendant, by his counsel, prayed the court to charge the jury, first, upon the issues raised by the plaintiff's declaration and the defendant's plea of set-off and to find from the evidence whether or not the de-

fendant was liable to the plaintiff for a breach of the promises and undertakings stated in the declaration, and, if liable, to what amount, and, on the other hand, to find from the evidence whether or not the plaintiff was liable to the defendant from (upon?) the promises and causes of action set forth in the plea of set-off, and, if so, to what amount.

And, second, the said defendant, by his counsel, prayed the court to charge the jury that if they believed from the evidence that the plaintiff and the defendant purchased the lots in controversy upon joint account in equal shares for resale at a profit upon an agreement to contribute equally to the purchase-money and the taxes and interest such understanding would constitute the parties copartners in such land speculation, and in the absence of final settlement and striking of a balance neither party could be sued at law by the other for reimbursement of advances made by him upon the joint account.

The defendant prayed the court to charge the jury that if the defendant received the deed sent him by Sidway, supposing
72 it to be a security for the money advanced by him without actual knowledge that it contained the assumption clause sued upon by plaintiff, the defendant was not bound by reason of the receipt of such deed to the assumptions therein contained if the defendant never, in fact, consented or agreed to such assumption.

Fourth. And the defendant further prayed the court to charge the jury that if they found from the evidence that the Cleaver note of $8,000, mentioned in the assumption clause of the deed of November 23, 1875, was at the time of the commencement of this suit held by the Illinois Trust and Savings bank and was not taken up or purchased by plaintiff until some time in 1883, after the commencement of this suit, up to which time the said Illinois Trust and Savings bank was its holder for value as collateral security to the demand note of plaintiff, of which it was also holder for value, such subsequent payment of purchase of the notes would confer upon the plaintiff no cause of action in this suit to recover the amount so paid.

And thereupon the court refused to charge the jury as secondly and fourthly above prayed and refused to charge according to either of said 2nd and fourth prayers, and proceeded to charge the said jury in substance as follows:

GENTLEMEN OF THE JURY: This case which you have in hand is a case of some considerable importance between these parties. It is particularly in a more than ordinary degree a question of fact for the jury.

It depends upon a single issue, and that is an issue peculiarly proper for the consideration of the jury, because the whole case turns upon a single question of fact apparently, and all of the evidence is clustered around that one issue and directed to elucidate it.

There have been some questions of law raised here, but the court has already intimated what the disposition of those questions will be.

73 Counsel for the defense has been in the habit, in the opening and on the trial and in summing up, of applying the term partners to these parties in this transaction, and he raises the question of law whether the facts will not show that they were partners. He claims, of course, if they were partners that this suit at law could not be maintained. As a proposition of law, allowing the facts to be as he states, that would be undoubtedly so. This case could not be maintained at law if the plaintiff and defendant were partners in the transaction which forms the subject-matter of this suit. Partners, on account of the confidential relation between them, are not allowed to sue one another in a court of law—that is, upon matters pertaining to the partnership affairs. Outside of that they have the privilege of suing one another and going into court as much as they please, but in relation to the partnership affairs they are not allowed to bring a suit at law. They would have to go in on the chancery side of this court, in a suit in equity, and have it tried before the court on depositions taken out of court and decided by the court without a jury; but, as the court has already intimated, I do not think that there is anything in this point, and it seems to me clearly to be a matter of afterthought on the part of counsel that these parties did not consider themselves partners, and on the former trial of this case the question was not raised; but still it is not too late to raise the question now. I am of opinion that the bare fact that two men agree to make a joint purchase of a piece of unimproved property for the purpose of holding it for a rise does not make them partners in law; they are joint tenants or, rather, tenants in common of the property, having an equal undivided interest—that is, if their interest is equal, an equal undivided interest, and the law gives them each an equal control of the property and they would

74 be equally liable for the payment of the taxes or other assessments upon it and equally liable, if that was the agreement between them, to pay each his share of the consideration money, and when the land came to be sold if their interests were equal they would be equally entitled to receive each his half of the purchase price, whatever it brought, whether it was more or less than the amount they paid for it. Of course, if it were less they would sustain the loss equally. If there were profits they would share equally the profits. It makes them simply tenants in common and joint owners of the property rather than partners.

The difference in law is very material.

Some question has been made also in regard to the manner in which this purchase-money was paid off and the matter closed out by Mr. Sidway here in Chicago and his paying off the Cleaver note of $8,000 by giving his own note, but I see nothing in the manner in which he did that, taking up the Cleaver note and substituting his own note at the bank, the bank taking it and holding it as an investment, and the manner in which the property was sold and the proceeds applied under the trust deed or mortgage on the purchase price, and the manner in which it was subsequently sold out by Mr. Sidway. I do not see anything in this that would prevent the plaintiff from recovering. In short, I see nothing in the case any-

where to prevent the plaintiff from recovering what he claims here—about $6,700 and some cents—provided the jury find the main issue in the case in favor of the plaintiff—that is, that Mr. Clark assented to become with the plaintiff a joint purchaser or purchaser on joint account of the property in question, either at one time or another whether he did at the beginning or after or just before the deed was delivered when he was here in Chicago or afterwards when the deed was made and put upon record and sent to him at Iowa City, in Iowa, in 1875, or whether he assented to it afterwards after the deed was
75 put away in his safe. If at any time you find that the understanding between the parties was that the defendant was to become an equal purchaser with the plaintiff, having an equal right in this property, and if he did so become an equal purchaser at any time in this property and liable to pay one-half of the purchase price, I see nothing in the case to prevent the plaintiff from recovering from the defendant that portion of the purchase-money which the defendant was under obligation to pay and which he did not pay and which the plaintiff was under obligation to pay and did pay on the defendant's account.

On the other hand, I see nothing in the case to prevent the defendant recovering from the plaintiff the amount of money which the defendant put in here on account of these drafts which were drawn upon him of $2,031.41 and $450. I see nothing in the case to prevent the defendant from recovering from the plaintiff that amount, amounting to something like $2,500, and the interest from the time it was put in, if you find the main issue in favor of the defendant.

There is no claim on the part of the plaintiff, as I understand, that if this transaction was simply a loan of money on the part of Mr. Clark to Mr. Sidway of this $2,031.40 and the $450, there is no evidence or pretence that this has ever been paid unless it was turned in as a part of the purchase price of this land; and if you find the main issue in favor of the defendant, as I said, there is nothing to prevent your giving a verdict for the defendant for the full amount.

It is not a case where there would be any occasion on the part of the jury to compromise this matter at all, and the jury need have no hesitation in deciding the case according to the weight of the evidence, wherever you find the weight of the evidence to be. If this was Mr. Sidway's business exclusively, why he took his own risk, and there is no
76 hardship in his losing all that there was to be lost if it was his own business. On the other hand, if Mr. Clark was a joint purchaser with him, and that was the agreement and understanding between the parties, there is no hardship in Mr. Clark bearing his share of the loss.

It is the duty of the court and jury to enforce contracts between parties just as you find them, according to the weight of the evidence, and not to look about for any excuse for not doing so or to seek a compromise between the parties. If this is the plaintiff's business, if he made that purchase alone, then it was at his own risk, and he ought to sustain the loss. If they went in on joint

account, having equal interest, it is perfectly right and proper, there being a loss, that they should share it equally according to the understanding between them. So the success with which the jury shall discharge its duty in this case will depend upon your being able to get at the bottom facts of this case and deciding the issue according to the very truth of the matters as it appears to you from the evidence; and, in order to do that, as there is a good deal of testimony in the case, you ought to pay a good deal of attention to this testimony and see where it should lead you, and see how you are satisfied after a thorough and careful consideration of the evidence on both sides. The evidence of the parties themselves, the plaintiff and the defendant, you will have no difficulty in recollecting. It is stated by counsel that it is conflicting and irreconci-able. Whether it is or not is a question of fact for the jury to determine. The statements of Mr. Sidway and Mr. Clark seem to the court to be entirely conflicting—that is, in their testimony here upon the stand and their testimony taken in the chancery court, which is of record and which has been read in your hearing, they seem to tell an entirely different story in regard to this transaction—in regard to the understanding between them as
77 to Mr. Clark's going in and accepting a half interest in this land; but it will be not only the duty, but the privilege, of the jury to decide upon the weight of this testimony—upon the weight of their statements standing alone—and to see to whose statements you should give the most credence, and especially it will be the duty and the privilege of the jury, if you find their statements conflicting and irreconcilable, to look into the record testimony and see who is best corroborated by that. There is a good deal of testimony in this case, and there is a good deal of testimony of a record kind, made up of the correspondence extending through a number of years—from 1872 to 1879—between these parties, bearing directly on this question. It will be your privilege and duty to take that correspondence with you to the jury-room and look it over. You have heard it discussed and read by counsel, and it is not the purpose of the court to go over this testimony at all on either side. I prefer that you should take it just as you have it from the discussion of counsel, as it lies in your minds. If you need any further assistance, take up these letters and peruse them at your leisure, taking your time to consider this case, and, if possible, arrive at a just conclusion from the weight of the evidence.

The burden of proof is undoubtedly on the plaintiff to show that the defendant under-ook to go in and did go in and take a half interest in this land. You will commence back of the transaction and consider the intercourse between the parties in 1872, when this transaction was initiated, when Mr. Sidway first bought the property and took the deed in his own name and drew the bill of exchange or draft upon Clark to pay the first installment of the purchase-money. The whole purchase-money amounted to something like $10,000. There was a mortgage of $8,000 on the premises, which was assumed by the purchaser as part of the pur-
78 chase price, and the plaintiff, Mr. Sidway, drew upon Mr.

Clark for the amount of money which had to be paid down, which, I believe, was $2,031 and some cents, and Mr. Clark paid that, but claimed at the time that he did not want to go in, and wrote the letter which you have heard read here. You will consider what the arrangement was subsequently in regard to it and the whole correspondence from that time between them down to the time that the deed was made. You will consider the evidence of the parties as to what took place between them before this deed was made when Mr. Clark came over here from Iowa and they went down to see the property. You will also consider the transaction of Mr. Sidway in making out this deed and writing to the defendant after having the deed recorded and sending it to Mr. Clark and this clerk or cashier taking it and putting it in the safe, and what Mr. Clark said in regard to it at the time.

Now, in regard to that deed which was made and sent, of course it is an important part of the evidence in this case. It is perfectly competent upon its face to convey a half interest in that property to the defendant. But the jury, of course, will consider that in a deed, as well as in any other contract, it takes two persons to make a bargain. Mr. Sidway could not impose a bargain upon the defendant by making out a deed and putting it upon record and sending it to the defendant in Iowa. He could not compel him to take a half interest in that land and pay half of the consideration money in that way; but the jury are to consider all the facts in connection with this transaction and determine in your own minds whether Mr. Clark, at the time he received that deed, knew what it was, and whether he ought to have known what it was, and whether, under the circumstances, by accepting it and putting it away in the safe and not returning it and not repudiating the transaction—whether he ought to be bound by it.

79 There is no doubt that if he received the deed, knowing what it was, and, furthermore, if he had reason to believe that it was an absolute deed, containing this provision requiring him to pay half of the purchase-money, from the transaction which had taken place previous to that between him and Mr. Sidway here in Chicago, he could not put that deed away in his safe and after a term of years say that he had not read it and didn't know what it contained. Even if there had been no talk between them before of his taking a half interest in it that deed would bind him if he knew what it contained. If he took that deed and knew what it was or had reason to know what was in it or ought to have looked at it and known what was in it, he could not keep that deed for a term of years and then afterwards say that he did not know what it was. He could not do that, because if it was the understanding between him and Sidway, when Clark was in Chicago, that the defendant should take a half interest, and that Sidway was to convey to him a half interest and get the deed recorded and send it to him, why just as soon as that deed was mailed in the post office in pursuance of that understanding it would be a delivery of the deed and binding upon Clark, and it would not make much difference what he did afterwards with it. His laying it away in the safe and not look-

ing at it would not be any protection and it would be no excuse for his repudiating the transaction afterwards.

But if you take Mr. Clark's version of this it presents a different case. If you assume that his version is correct, that he had no understanding with Sidway that he was to take a half interest in this land, and no agreement of that kind, but that these advances of money, the $2,000 and odd dollars and the $450, were mere loans of money, and that Sidway was to send him a mortgage
80 for that or a deed in the nature of a mortgage to secure the payment of those advances, why, then, there would be some excuse for Mr. Clark understanding it in that way. He would have a right to understand it just according to their understanding, and then there would be a good excuse for his putting that deed away in his safe and not reading it, supposing that it was in accordance with the understanding which he had with Sidway. Now, whether Mr. Clark was bound by that deed will depend upon what the understanding between the parties was. If it was the understanding that Clark was to take a half interest and Sidway was to send the deed, then there is no doubt but what that would be binding upon Mr. Clark. It would be a delivery from the time it was posted in the post office, and he could not lay it away in his safe and afterwards say that he did not read it and know what was in it. It would not make any difference in that event whether he read it or not. But if the understanding was that he was merely to send him a mortgage or a deed in the nature of a mortgage to secure him for these advances of money, then Clark would have the right to presume when that paper came that it was such as they had agreed upon, and there would be an excuse then for his laying it away in the safe and not reading it. So that it is very important, in order to determine the binding effect of that deed, that the jury should consider all the circumstances in this case—all the evidence, both the testimony of the witnesses in court and all the record evidence in the case—to see what the understanding of the parties was. If you find that Mr. Clark at any time became cognizant of what that deed contained, whether at the time it was received or some time afterwards, if it was different from what he expected it to be, it was his duty, as soon as he ascertained it, to return it and repudiate the transaction, and if he kept it for a term of years after he knew
81 what it contained without repudiating the transaction or giving any notice that he would not be bound, I think he would be estopped from saying afterwards that it was not the way he understood it to be.

Then, gentlemen, there is some evidence in the case. What bearing it has will be for you to say. In the record correspondence of these parties after this deed was sent in 1875 they kept corresponding about this land away down to 1877, and perhaps later. I do not know but what their correspondence extended to 1879. At any rate, there is some correspondence of some importance between the parties, letters written back and forth, if I remember right, in the year 1877, which I think will throw some light upon this transaction. How much will be for the jury to say. It will be important

for you to look into that and see how the parties themselves regarded this transaction. If the defendant, by his written acknowledgments and recognitions, regarded this transaction in the light as claimed by the plaintiff, that he did have a half interest in it and recognized this interest in that property, that will be an important consideration for the jury, because it cannot be expected that they should regard the matter in one light and the jury regard it in another light. There is a good deal to be gathered, I think, by the jury from a close scrutiny of the letters which passed between these parties. It is important that you should look into it to see who is best corroborated and whose theory of the case is best supported by this evidence and on what theory of the case, whether the plaintiff's theory or the defendant's, can you account for the conduct of the parties all the way through, what they did and what they refrained from doing and the letters that they wrote; on which theory can you account for all of these things that are in evidence and the admitted facts of the case. There are a good many facts in this case that are not disputed, and those are
82 to be considered by the jury as well as the other facts, and you are to see to what conclusion you ought to be led from the testimony as a whole.

If the jury find a verdict for the plaintiff it will — for the *the* amount which the plaintiff has been obliged to pay on this matter for the purchase-money and the interest and for the taxes and assessments which belonged to the defendant to pay and which the defendant has not paid. If you find the plaintiff's theory to be correct, of course the defendant should be credited with all that he has paid, these two drafts that have been drawn on him, and the plaintiff should be credited with all that he has paid, and then strike a balance, and one-half of that would belong to Mr. Clark to pay and one-half of it to the other party. No; that is not right, but at any rate Mr. Sidway will be entitled to recover just that portion of the purchase-money and what expenses he has been to in the way of taxes, interests, and assessments which belong to the defendant Clark to pay, and which would be one-half of the whole. If the evidence shows that they were in equally on this joint purchase one would have to pay half and the other half. If, on the other hand, you find that the defendant's theory of this case is correct; that he never undertook to take a half interest in this property, and that these payments of these drafts were mere advances of money, then the defendant would be entitled to recover from the plaintiff the amount of those drafts or payments, with interest. You will take the case, gentlemen, and decide it according to the weight of the evidence.

83 And be it further remembered that the defendant then and there excepted to the refusal of the court to charge as prayed in the aforesaid second and fourth prayer, and then and there excepted to the said charge as given to the jury; and especially then and there excepted to such portions of the charge as hold that the evidence of the plaintiff tended merely to show that the parties to

the suit were simply tenants in common and not partners in the land in controversy; and substantially charged the jury that there was no evidence in the case tending to show that the parties purchased and held the land in controversy as copartners; and further then and there excepted to that portion of the charge in which the court instructed the jury as follows:

"In short, I see nothing in the case anywhere to prevent the plaintiff from recovering what he claims here, about $6,700 and some cents, provided the jury find the main issue in the case in favor of the plaintiff—that is, that Mr. Clark assented to become with the plaintiff a joint purchaser or a purchaser on joint account of the property in question. * * * If at any time you find that the understanding between the parties was that the defendant was to become an equal purchaser with the plaintiff, having an equal right in this property, and if he did so become an equal purchaser at any time in this property and liable to pay one-half of the purchase price, I see nothing in the case to prevent the plaintiff from recovering from the defendant that portion of the purchase-money which the defendant was under obligation to pay and which he did not pay, and which the plaintiff was under obligation to pay and did pay on the defendant's account."

And be it further remembered that the jury having been charged by the court were directed by the court, by consent of parties, to sign and seal their verdict, if they found a verdict, and to
84 separate if they saw fit and return such verdict at the opening of court upon the following day.

And be it further remembered that on the following day, which was March 28th, 1888, at the opening of court the said jury returned into court after having separated during the previous night and after having returned into court a verdict in said cause in the form in which the same now appears of record in the words and figures following, to wit:

$6,700\frac{75}{100}$. CHICAGO, *Mar. 27th*, 1888.

We, the jury, find for the plaintiff and assess the damage at six thousand seven hundred dollars and seventy-five cents.

J. S. BARTLETT, *Foreman.*
J. C. THOMAS.
DANIEL MICHAEL.
THOS. HURLSTONE.
JACOB H. WOLF.
G. W. BURCHARD.
JAS. VAN BUREN.
C. P. CLARK.
MIKE FORD.
M. P. GERRITY.
H. H. SICHTEMWALTER.
RUFUS KING.

Save that no amount was mentioned as the amount of damages found for the plaintiff, but a blank was left therefor.

85 And thereupon the court told the jury that if they found for the plaintiff they should have found the amount of the plaintiff's damages and inserted it in the verdict, otherwise the verdict could not be received, and that the jury would have leave to retire and find such amount. Whereupon the foreman of the jury then and there stated, in the presence and with the concurrence of the other jurors, that the jury had already agreed upon the amount which was the sum testified to by the plaintiff—about six thousand and seven hundred dollars—but that none of the jurors were able to remember the precise figures, and for that reason they had decided to defer inserting the amount until they should come into court; and the jurors thereupon requested the court to give them the amount, as testified to by the plaintiff, from the court's minutes, and that the jury would insert it in their verdict.

And thereupon the court gave the jury the amount as testified to by the plaintiff as being the balance due him, from the court's minutes, and the foreman of the jury then and there, in open court and without retiring, inserted such amount in the verdict, with the consent and concurrence of each and all the jurors; and thereupon the court inquired of the jury if the verdict so filled up was the verdict of the jury, one and all, and each and all of the jury thereupon answered that it was their verdict; and thereupon the verdict was received and ordered to be recorded, and the jury discharged. No exception was taken at the time to the jury filling out the blank in the manner they did, or to the receipt of the verdict. The recollection of the judge who tried the cause is that the counsel for the defendant were not in court when the jury gave their verdict, but that afterwards, on the same day, they came into court, made

86 a motion for a new trial, and among other things took exceptions to the manner, as above stated, in which the blank for damages was filled and the verdict received, which exceptions were allowed by the court.

And be it further remembered that afterwards, to wit, on the 29th of March, 1888, the said court being still in session during the term aforesaid, the said defendant filed in said cause his written motion for a new trial therein in the words and figures following, to wit:

United States Circuit Court, Northern District of Illinois.

LEVERETT B. SIDWAY
vs.
EZEKIEL CLARK.

And now comes said defendant, by Paddock, Aldis & Wright, his attorneys, and moves the court to set aside the verdict and grant a new trial in said cause for that—

1. The said verdict is against the evidence in said cause.
2. The said verdict is excessive and unjust in amount.
3. The verdict should have been for the defendant upon his counterclaim.

4. The jury, having leave of court to agree upon, make, and seal their verdict in writing and deliver such verdict to the officers of the court, and then separate to return at the opening of such verdict in court, separated some time during the night of March 27th, 1888, and that without having agreed upon, making, or sealing a verdict in said case, and made no verdict in said case until after the hour of ten a. m., March 28th, 1888, when they reassembled and came into court, and after further consideration of the facts in the case made and returned their verdict to the court in said case.

5. The court erred in his rulings on the trial in refusing the written requests and each of them of defendants as to the
87 charges; in his rulings during the trial upon the question of partnership between the parties upon the case as made by plaintiff, and the court erred in his charge to the jury and misdirected the jury as to the law in his charges.

6. The court or its officers in charge of the jury erred in permitting the jury to separate and go home without having agreed upon and sealed a verdict in the case.

7. The jury erred in asking the court on reassembling on the morning of March 28th, 1888, for information in point of fact in aid of their memory of the testimony in order that they could fill the blank for the plaintiff's damages left in the paper sealed by them the night before, and the court erred in giving the jury such information as to the facts testified to as enabled the jury then and there to fill such blank and render such amount as their verdict, without hearing any further evidence upon the point and under the circumstances shown in the affidavit herewith filed.

8. The verdict was based not only upon the evidence heard by the jury on the trial, but on the above information given by the court.

PADDOCK, ALDIS & WRIGHT,
Att'ys for Def't.

And in support of such motion filed the affidavit of Samuel H. Wright in the words and figures following, to wit:

UNITED STATES OF AMERICA,
U. S. Circuit Court, Northern District of Illinois, } *ss:*

LEVERETT B. SIDWAY
vs.
EZEKIEL CLARK.

88 S. H. Wright says upon oath that he is one of the attorneys for defendant in the above-entitled cause; that he attended at the court-room of Judge Bunn on the 28th day of March, 1888, at the hour of ten o'clock a. m.; that at that time the jury in the above case had separated and were assembling to come into court; that at or about the same hour the court came into the room—the Honorable Romanzo Bunn—and, the court having been opened, the clerk of said court opened a sealed envelope and read the verdict now on file in said cause, with the exception that there

was a blank as to the amount of the jury's finding for the plaintiff, being substantially that they found the issues for the plaintiff and assesses his damages at — dollars; that the court then asked of the jury their reason for returning such a verdict and why they had not filled in the amount of plaintiff's damages, in response to which question one of the jurors, whose name is to this affiant unknown, replied as follows: "We left that blank for the reason that we did not know what sum to insert; we had nothing upon which to figure." Another of said jurors remarked as follows: "We could not recollect how much the plaintiff was claiming." That the court then suggested to the jury that his, the court's, recollection of the amount claimed by the plaintiff was $6,700.75; that one or more of said jurors then professed to remember that such was the amount claimed by the plaintiff, and upon the court's asking said jury collectively if $6,700.75 was the amount which they wished to insert in said verdict as the amount of plaintiff's damages, and upon their signifying that such was their wish, the court directed the clerk to hand the verdict to one of the jurors for the purpose of inserting therein the figures $6,700.75, which was done; that such paper so amended was then read to the jury, and upon their
89 being asked if it was their verdict they replied that it was, and the same was then entered by the clerk as and for the verdict in said cause; that all said matters were a surprise to said defendant and his counsel, and in nowise were they consented to by him or them, the said action of the court being entirely upon the motion of the said court and jury.

S. H. WRIGHT.

Subscribed and sworn to before me this 28th day of March, 1888.

[SEAL.] FRANK E. LORD,
Notary Public.

(Endorsed:) Filed March 29, 1888. Wm. H. Bradley, clerk.

And be it further remembered that, after argument of counsel upon such motion as well for the defendant as for the plaintiff, the court announced his intention of overruling such motion, provided the plaintiff would remit all damages mentioned in said verdict in excess of $4,000; which remittitur the said plaintiff then and there consenting to, the said court then and there entered judgment for the said sum of $4,000; to which remittitur and the action of said court in allowing the same the said defendant then and there excepted; and, inasmuch as the aforesaid matters do not otherwise appear of record in said cause, the said defendant prays the said court by one of its judges to sign and seal this his bill of exceptions, which is now done on this 8th day of June, A. D. 1888.

ROMANZO BUNN, *Judge.* [SEAL.]

(Endorsed:) Filed June 8th, 1888. Wm. H. Bradley, clerk.

90 Afterwards, to wit, on the third day of August, 1888, there was filed in said clerk's office a bond in said entitled cause; which said bond is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, Ezekiel Clark, as principal, and Sam'l M. Nickerson, as surety, are held and firmly bound unto Leverett B. Sidway in the full and just sum of five hundred (500) dollars, to be paid to the said Leverett B. Sidway, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23 day of July, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately,—a term of the circuit court of the United States for the northern district of Illinois, holden at Chicago, in a suit depending in said court between Leverett B. Sidway and Ezekiel Clark, a judgment for four thousand (4,000) dollars and costs was rendered against the said Ezekiel Clark in favor of the said Sidway, and the said Ezekiel Clark having obtained a writ of error
91 and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Leverett B. Sidway, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Ezekiel Clark shall prosecute his said writ of error to effect and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

E. CLARK. [SEAL.]
SAM'L M. NICKERSON. [SEAL.]

Approved.
H. W. BLODGETT, *Judge.*

Endorsed: Filed August 3, 1888. Wm. H. Bradley, clerk.

92 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record of all the proceedings had in said court in the cause wherein Leverett B. Sidway, for the use of John R. Lindgren, is the plaintiff and Ezekiel Clark is the defendant as the same appear from the records and files of said court now remaining in my custody and control.

Seal of Circuit Court U.S., Northern Dist. Illinois, 1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this twelfth day of September, 1888.

WM. H. BRADLEY, *Clerk.*

93 UNITED STATES OF AMERICA, } 88:
Northern District of Illinois, }

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court between Leverett B. Sidway, plaintiff, and Ezekiel Clark, defendant, in an action of assumpsit, a manifest error hath happened, to the great damage of the said Ezekiel Clark, as by his complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1888, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal of Circuit Court U.S., Northern Dist. Illinois, 1855.

Witness the Hon. Samuel F. Miller, acting Chief Justice of the Supreme Court of the United States, this twenty-eighth day of July, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the 113th year.

WM. H. BRADLEY,
Clerk of the United States Circuit Court for the Northern District of Illinois.

[Endorsed:] Supreme Court of the United States. Ezekiel Clark *vs.* Leverett B. Sidway. Writ of error. Copy deposited for the defendant in error in the clerk's office U. S., northern district of Illinois.

94 UNITED STATES OF AMERICA, } 88:
Northern District of Illinois, }

To Leverett B. Sidway, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1888, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Ezekiel Clark is the plaintiff in error, to show cause, if any there be, why the judgment therein mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. H. W. Blodgett, acting circuit judge, this 28th day of July, in the year of our Lord one thousand eight hundred and eighty-eight.

H. W. BLODGETT, *Judge.*

Service accepted this 31st day of July, 1888.

JNO. N. JEWETT,
By JNO. N. JEWETT & JEWETT BROS.,
Attorney- for Defendant in Error.

95 [Endorsed:] Supreme Court of the United States. Ezekiel Clark *vs.* Leverett B. Sidway. Citatation to October term, A. D. 1888.

96 Supreme Court of the United States.

EZEKIEL CLARK, Plaintiff in Error, *vs.* LEVERETT B. SIDWAY, for the Use of JOHN R. LINDGREN, Defendant in Error.	Error to the Circuit Court of the United States, Northern District of Illinois.

And now comes the said plaintiff in error, Ezekiel Clark, by George L. Paddock, his attorney, and says that in the above and foregoing record there is manifest error, in this, to wit:

1st. That the said circuit court erred, to the prejudice of defendant below, in refusing on the trial to charge the jury as prayed by the defendant in the second and fourth prayers of defendant's counsel or either of them.

2nd. That the court erred, to the prejudice of defendant below, in the charge as given to the jury, and especially erred in charging the jury in said charge that there was no evidence before the jury tending to show a copartnership in the land between plaintiff and defendant.

3rd. That the court erred, to the prejudice of defendant below, in that part of his said charge which charges that the whole case
97 turned "upon a single question of fact apparently;" and again erred in that part of the charge wherein the court charged the jury as follows: "I am of opinion that the bare fact that two men agree to make a joint purchase of a piece of unimproved property for the purpose of holding it for a rise does not make them partners in law. They are joint tenants, or rather tenants in common, of the property, having an equal undivided interest—that is, if their interest is equal—an equal undivided interest—and the law gives them each an equal control of the property, and they would be equally liable for the payment of the taxes or other assessments upon it, and equally liable if that was the agreement between them to pay each his share of the consideration money; and when the land came to be sold, if their interests were equal, they would be equally entitled to receive each his half of the purchase price, whatever it brought, whether it was more or less than the amount they paid for it. Of course, if it were less they would

sustain the loss equally. If there were profits they would share equally the profits. It makes them simply tenants in common and joint owners of the property rather than partners. The difference in law is very material."

98 4th. That the court especially erred in that part of said charge wherein the court charged as follows: "Some question has been made also in regard to the manner in which this purchase-money was paid off and the matter closed out by Mr. Sidway here in Chicago and his paying off the Cleaver note of $8,000 by giving his own note; but I see nothing in the manner in which he did that, taking up the Cleaver note and substituting his own note at the bank, the bank taking it and holding it as an investment, and the manner in which the property was sold and the proceeds applied under the trust deed or mortgage on the purchase price, and the manner in which it was subsequently sold out by Mr. Sidway. I do not see anything in this that would prevent the plaintiff from recovering. In short, I see nothing in the case anywhere to prevent the plaintiff from recovering what he claims here, about $6,000 and some cents, provided the jury find the main issue in the case in favor of the plaintiff—that is, that Mr. Clark assented to become with the plaintiff a joint purchaser or purchaser on joint account of the property in question either at one time or an-
99 other, whether he did at the beginning or after or just before the deed was delivered, when he was here in Chicago, or afterwards when the deed was made and put upon record and sent to him at Iowa City, in Iowa, in 1875, or whether he assented to it afterwards—after the deed was put away in his safe. If at any time you find that the understanding between the parties was that the defendant was to become an equal purchaser with the plaintiff, having an equal right in this property, and if he did so become an equal purchaser at any time in this property and liable to pay one-half of the purchase price, I see nothing in the case to prevent the plaintiff from recovering from the defendant that portion of the purchase-money which the defendant was under obligation to pay and which he did not pay and which the plaintiff was under obligation to pay and did pay on the defendant's account," and that such charge was otherwise erroneous and prejudicial to the defendant.

5th. And that the said court again erred in overruling the above exception of defendant to the said charge.

6th. And that the said court erred in overruling the defendant's said motion for a new trial in said cause.

7th. And that the said court erred in allowing the plaintiff, under the circumstances shown above, to remit said verdict down to
100 $4,000 and in entering such remittitur and in rendering judgment for said sum of $4,000 against the exception of defendant.

Wherefore the said plaintiff in error prays the judgment of this

court and that the judgment of the said circuit court may be reversed and said cause remanded.

GEO. L. PADDOCK,
Att'y for Pl'ff in Error.

65 Portland bl'k, Chicago, Ills.

Endorsed on cover. N. Illinois C. C. U. S. No. 140. Ezekiel Clark, plaintiff in error, *vs.* Leverett B. Sidway. Filed October 1, 1888.

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CLERK.

BRIEF FOR APPELLANT.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1891.

No. 140

EZEKIEL CLARK, PLAINTIFF IN ERROR,

vs.

LEVERETT B. SIDWAY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

C. C. NOURSE, *with* GEO. L. PADDOCK,
Attorney for Plaintiff.

P. C. KENYON, LAW AND COMMERCIAL PRINTER, DES MOINES, IOWA.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1891.

No. 140.

EZEKIEL CLARK, PLAINTIFF IN ERROR,

vs.

LEVERETT B. SIDWAY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

THIS was an action at law commenced October 13, 1880, by Sidway, defendant in error, for the pretended use of one John R. Lindgren, claiming $8,000 damages from Ezekiel Clark, plaintiff in error.

The declaration has two counts, the first of which sets out that on the 23d day of November, 1875, Sidway executed to Clark a deed for an undivided half of certain lots in Chicago, Illinois, in which it was recited that an incumbrance of $8,000 existed thereon, being a trust deed executed by one Charles Cleaver and wife, and that Clark was to pay one-half thereof with interest and save Sidway harmless on account thereof.

It is alleged that the $8,000 note fell due and that defendant neglected and refused, though often requested, to pay the one-half of said note, and that he did not save plaintiff harmless from the payment of the note, and that by reason thereof the defendant undertook to pay plaintiff $4,000 on request. It is not alleged that plaintiff paid the note or his half of it, or any part of it, or that he was damaged in any way; nor is it alleged that plaintiff when he requested defendant to pay one-half of the note, offered himself to pay the other half.

The second count is only a claim for moneys lent to defendant, paid for defendant, received by defendant for plaintiff's use, and for interest—common *indebitatus* count.

The facts developed on the trial were as follows: On the 12th of August, 1872, Sidway, defendant in error, purchased from one Charles Cleaver the lots in question for the consideration of $10,000, and received a deed therefor dated the May previous, which deed recited that the property was incumbered by a certain trust deed with power of sale, executed July 1, 1870, by Charles Cleaver and wife to one Benjamin E. Gallup, trustee, to secure the sum of $8,000, payable in five years from date, with interest at 10 per cent per annum, payable semi-annually, which incumbrance Sidway assumed to pay, as part of the consideration. (Record, page 19.)

Previous to this purchase by Sidway he had solicited Clark to join him in making some real estate speculations in Chicago property, but no agreement or understanding had been arrived at.

When Sidway bought this property from Cleaver, he drew his draft on Clark, who resided at Iowa City, Iowa, for $2,031.40, being the full amount of the purchase money over and above the incumbrance assumed, and by letter advised Clark of the draft, and urged him to advance the money and become a partner in the transaction. (See letter, p. 27, record.) The proposition was declined by Clark, but upon a telegram

from Sidway asking him to protect the draft and promising "to arrange it in some way," Clark paid the draft. (Record, p. 28.)

In December, 1872, Clark wrote Sidway as follows: "I pro- "cured a loan from P. P. Freeman to pay draft you drew on "me, which he would like to have now. Will I draw for the "amount?" (Record, p. 23.)

On the 26th of December, in answer to this letter, Mr. Sidway writes as follows: "I have delayed answering, hoping to get "some money due me. Now if you can add interest and draw "at 60 days it will suit me first rate, but if you can't, I will, "of course, pay any time. I am sorry you don't go in on this "thing," etc. (Record, p. 28.)

On the 22d of May, *1875*, Sidway wrote again to Clark:

> Having heard nothing from you regarding the lots since December, 1872, I fully supposed the purchase was to stand as originally proposed. It would be particularly inconvenient for me to make any change just now. As you will probably find time to come over during the early part of next summer, let matters rest until then, and I think you will come to a conclusion soon after looking over the ground. At least, we will close in some way definitely.

The Cleaver note for $8,000 had matured prior to the writing of this letter, to-wit, on the 2d day of May, 1875, and on that day Sidway borrowed $8,000 from the Illinois Trust and Savings Bank, of which he was then president, with which money he paid or took up the Cleaver note, and took from the then holders of the Cleaver note an assignment as follows:

"July 2, 1875, without recourse pay order of L. B. Sidway.
"GALLUP & PEABODY."

(Record, p. 18.)

Sidway gave to the Illinois Trust and Savings Bank his own demand note for $8,000, with 8 per cent interest, and indorsed the Cleaver note as follows:

"Pay Illinois Trust and Savings Bank or order.

"L. B. SIDWAY and

"EZEKIEL CLARK, by L. B. Sidway."

At the same time he handed over to the bank the Cleaver trust deed and executed to the bank a power of attorney describing the Cleaver note and trust deed as collaterals to the $8,000 demand note, and authorizing the sale of them at public or private sale for the payment of his demand note. Sidway also wrote a memorandum on the note as follows: "This is per "joint account of myself and Ezekiel Clark, Iowa City, Iowa." Sidway continued to act as president of the bank up to December, 1877.

On the 10th of March, 1879, the bank procured Lindgren to act as a pretended purchaser of the Cleaver note and mortgage for the pretended consideration of $2,000, for which Lindgren gave his check to the bank, which check was afterward surrendered to him, and Lindgren testifies he has no interest in this controversy or in the property, and never authorized this suit to be brought, and had no knowledge of it.

On the 20th of June, 1879, there was also a pretended sale upon notice by the trustee, of the real estate described in the trust deed of Cleaver and wife, and a pretended purchase by Lindgren, and a conveyance to him by the trustee of the real estate, and on the 25th of September, 1879, Lingren executed a quitclaim deed for the property to the president of the bank, John J. Mitchell, in trust for the bank. (Record, pp. 34, 26.)

It further appeared from the evidence of Mitchell, and was not disputed, that up to the 15th of June, 1883, the Illinois Trust and Savings Bank held the Cleaver note and mortgage and the quitclaim from Lindgren for the lots described in the Cleaver mortgage, and at that date the bank had a settlement or adjustment with Sidway and surrendered to him his notes

for the $8,000 loan, and about six or eight thousand dollars additional, in all $14,000 or $16,000; that Sidway paid the bank $5,000 cash, gave his own note for about $9,200, a note of another party for about $2,000, and the bank, at his request, deeded the real estate to his brother-in-law, one Dr. Martin; that all the business was transacted by Sidway, Martin having nothing to do with it, and paying no consideration for the transfer of the property.

It further appeared in evidence that the lots were afterward sold for $14,000 to $16,000, out of which was paid about $3,000 to redeem the property from tax sale.

The plaintiff claims that on the 23d of November, 1875, at defendant's request he executed the deed for an undivided half of the Cleaver lots to the defendant Ezekiel Clark, and that Clark received said deed and thereby assumed to pay one-half of the note secured by the trust deed executed by Cleaver and wife to Gallup, to secure the $8,000.

Clark, in addition to the $2,031.40 paid on the first draft drawn upon him by Sidway, also advanced to Sidway $450, and Clark claims that Sidway, a short time prior to the execution of this deed, promised to give him security for the money so advanced, and when this deed from Sidway was sent by mail, he supposed it to be security for these advances, and that he did not examine the deed and never knew of this assumption clause in it.

Sidway testifies that as early as *1872* Clark verbally agreed to advance half the purchase money, taxes, etc., on the property and share half the profits.

Clark testifies to the contrary.

January 13, 1876, Sidway claims that he made out a statement of joint account, charging Clark with taxes, etc., and sent the same by mail to Iowa City, to Clark's address.

His own letter, however, written January 5, 1877, shows that this first account was made out in July, 1876, and had been

left loose on his desk and never sent to Clark at all, and Clark testifies he never received it. (Record, p. 31.)

An account of the same nature was made out by Sidway in January, 1877, claiming from Clark a balance of $718.08, and another in January, 1878, claiming a balance of $868.56, and concurrent with mailing the accounts to Clark, Sidway drew drafts for such balance upon Clark, which Clark refused to pay. (Record, p. 21.)

In none of these accounts rendered did Sidway claim to have paid any part of the Cleaver note and mortgage, nor did he claim anything from Clark upon a claim that Clark had refused or neglected to pay the one-half of the Cleaver note. He, however, claims for interest paid on the Cleaver note from January 1, 1873, to January 1, 1876, and for interest paid to July 1, 1877.

In 1877 Clark became aware of the fact that the bank was making some claim against him on account of this transaction, and he promptly repudiated any liability. (See correspondence, Record, pp. 32, 33.)

The jury returned a general verdict for plaintiff without assessing the amount, stating that they could not recollect the amount claimed by plaintiff. Upon suggestion of the amount by the court, the jury filled in the verdict for $6,700.75, being the amount that Sidway figured out as due him upon claim that in October, 1872, when the title stood in his own name, Clark had verbally agreed to become a partner with him in the profit and loss of this deal, including all sums advanced for taxes, etc.

The deed that was made in November, 1875, to Clark, does not assume the payment of any taxes, but merely requires the grantee to assume the payment of one-half the amount of the trust deed, with interest from 1872.

The court, on motion for a new trial, reduced the verdict to $4,000. It is impossible to guess why the court reduced the verdict to $4,000, save and except that $4,000 was within the

limit fixed by the statute for an appeal. The court had expressly told the jury that there was no middle ground for a compromise; that they must either find for the plaintiff $6,700, or they must find for the defendant the amount of money advanced by him to plaintiff, with 6 per cent interest. We presume that the court, upon a review of its own rulings, found error in the case, and this error was not cured by reducing the verdict to $4,000. Taking the theory of the case claimed by the plaintiff, the account between the parties, upon a basis of what was paid out and what was realized, stating the latter at the very lowest figures, would stand as follows:

Original cost of property		$10,021 40
Interest and taxes paid by Sidway, as per account rendered (record, p. 22)		4,134 72
Paid to redeem property from tax sale		3,000 00
Total		$17,156 12
Received from sale of property		14,000 00
Total loss		$ 3,156 12
One-half of loss to each		$ 1,578 06
Cash paid by Clark	$2,021 40	
" " " "	450 00	
Total		$ 2,471 40
The difference between Clark's share of the loss and amount paid by him, for which he was entitled to judgment		$ 893 34

Or, stating the account as to what was paid and received by Sidway:

Paid by Sidway in discharge of mortgage on original purchase		$ 8,000 00
" " on interest and taxes	$4,134 72	
Less amount paid by Clark and applied on taxes	450 00	$ 3,684 72
To redeem property from tax sale		3,000 00
Total		$14,684 72
Received from sale of property		14,000 00
Balance of loss paid by Sidway		$ 684 72
Sidway's share of loss (one-half)	$1,578 06	
Deduct loss paid by Sidway	684 72	
Leaves overpaid by Clark		$ 893 34

In the above computation we have taken Sidway's statement of account of interest paid as found on page 22 of the record. This account charges interest January 1, 1876, July 1, 1876, and January 1, 1877, $400 each, whereas on the 2d day of July, 1875, Sidway borrowed the money from the bank, at 8 per cent, making a difference

In Clark's favor of the further sum of	$ 340 00
Which added to the	893 34
Makes due Clark from Sidway	$1,233 34

upon the basis of a joint enterprise, instead of $4,000 in Sidway's favor, for which the court has rendered judgment against Clark.

The defendant's claim was that the money he had advanced to Sidway was a loan pure and simple, and that he never agreed to any partnership or joint purchase, and that Sidway was simply appropriating his money without authority in a real estate speculation, and was keeping both the money and the property for his own use.

ARGUMENT.

In this case we insist that plaintiff must recover, if at all, upon the theory that he paid off the Cleaver note, and that Clark was indebted to him for contribution.

If plaintiff predicates his right of action against Clark upon the theory that he paid off the Cleaver note, on the 2d of July, 1875, with the money he borrowed from the bank, then his assignment of the Cleaver note and trust deed to the bank, and the subsequent sale of the property by the bank, and its transfer to Dr. Martin, were all fraudulent devices to cheat and defraud Clark out of any interest in the property, and upon plaintiff's theory of a partnership or purchase on joint account,

plaintiff must account for the proceeds of the property finally realized by him.

If, on the contrary, plaintiff claims that the Cleaver note and mortgage were not paid off on the 2d of July, 1875, but that the bank owned the note and trust deed, and had a right to sell out the property, then it is very clear that such ownership continued until June 15, 1883, and that at the time this suit was commenced, to-wit, October 13, 1880, the plaintiff had no cause of action.

The circuit court adopted the theory that *actual payment* of the Cleaver note and mortgage by Sidway was a condition precedent to his right to maintain this suit, as appears from the following instruction given to the jury:

> If at any time you find that the understanding between the parties was that the defendant was to become an equal purchaser with the plaintiff, having an equal right in the property and liable to pay one-half of the purchase price, I see nothing in the case to prevent the plaintiff recovering from the defendant that portion of the purchase money which the defendant was under obligation to pay and did not pay, and which the plaintiff was under obligation to pay *and did pay on the defendant's account.*

Now the undisputed evidence shows that at the time this suit was commenced, to-wit, October 13, 1880, and until June 15, 1883, the Cleaver note and mortgage was held by the Illinois Trust and Savings Bank, by virtue of the assignment made to the bank by Sidway, and to which assignment he had also attached Clark's signature. Sidway had then paid no part thereof unless this transaction of May 2, 1891, is to be treated as a payment, and if so, then the Cleaver note and mortgage was extinguished and Sidway, upon plaintiff's theory of buying the property and selling it on joint account, must account for the property.

Sidway, if he paid the note and trust deed May 2, 1891, paid it in pursuance of his previous agreement with Charles Cleaver. Will it be claimed in this case that as to Charles

Cleaver, the maker of the note and trust deed, the same were kept alive and that Charles Cleaver could be made liable to the bank for the balance, after crediting the note with $2,000, the amount of Lindgren's bid? As to the legal effect of the transaction, see

Day vs. Humphreys, 79 Ill., 452.
Johnson vs. Walker, 60 Iowa, 315.
Byington vs. Fountain, 61 Iowa, 514.

If the jury found, as claimed by plaintiff, that Clark in October, 1872, had agreed to become a joint purchaser with Sidway of an undivided half of these lots, and assumed to pay one-half of the $8,000 that Sidway had become liable for, then the payment by Sidway of the Cleaver note and mortgage extinguished the mortgage and Clark became liable as of that date to pay Sidway the one-half of the $8,000, less the money already advanced, and the attempt of Sidway to keep the mortgage or trust deed alive and have the property sold out under it for his own benefit and afterward to appropriate the increased value realized on the property, was all illegal. Hence we say the court erred in instructing the jury that "there was nothing in the manner in "which the property was sold and the proceeds applied under "the trust deed or mortgage on the purchase price and the "manner in which it was subsequently sold out by Mr. Sidway "that would prevent the plaintiff from recovering."

The defendant claimed that Sidway had procured from him the money with which to buy the property, and then had falsely claimed a purchase of it on joint account, and had also at the same time manipulated matters through the assignment of this trust deed so as to deprive the defendant of all interest in the property, and had appropriated to himself the exclusive benefit of the resale of the property, and was then claiming to recover in addition from the defendant one-half of the balance of the

purchase money, taxes, etc., on the claim that it was a joint enterprise.

The court instructed the jury that it could see nothing in this theory of defendant, and instructed them to disregard the undisputed evidence bearing upon this point.

After admitting the evidence that clearly tended to establish the fact that Sidway had secured to himself the full benefit of the ultimate rise in the value of the property, and that the foreclosure and sale under the trust deed was all a sham for Sidway's benefit, and after defendant's counsel had addressed the jury upon this defense, the court told the jury in terms as follows: "In short, I see nothing in the case anywhere to pre-"vent the plaintiff from recovering what he claims here, about "$6,700 and some cents, provided the jury find the main issue "in the case in favor of the plaintiff, that is, that Clark assented "to become, with the plaintiff, a joint purchaser or purchaser "on joint account with the plaintiff of the property in ques-"tion." (See exception, Rec., p. 42.)

This is the fourth assignment of error.

Embraced in the same instruction and in this fourth assignment of error is the further error of utterly ignoring the fact that the bank held the Cleaver note and mortgage, and had sold them under a power of attorney, and still claimed to own them until 1883, and that this was two years after this suit was brought. When this suit was brought in 1880, it was upon the theory that John Lindgren owned the Cleaver note and mortgage, and the suit purports to have been brought for his use, but Lindgren's disclaimer disposes of that theory.

The instruction of the court is based upon the theory that Sidway paid off the note by substituting, or giving, his own note to the bank, but the facts are that Sidway's note was given to the bank for borrowed money. This money was paid to Gallup and Peabody. Gallup and Peabody assigned the note, not to the bank, but to Sidway, and Sidway undertook to pledge

the Cleaver note and to assign it in the name of himself and Clark as security for his own debts to the bank. Not only for the $8,000 borrowed then, but also for other money previously borrowed. (See Record, p. 20.)

Whatever right, or title, the bank got to the note and mortgage of Charles Cleaver, they got through the assignment to them by Sidway. The bank claimed the right to the Cleaver note and mortgage, under, and by virtue of Sidway's assignment and the power of attorney executed to the bank by Sidway, and its sale to Lindgren. The charge of the court ignored the real transaction as set forth in the evidence. It appeared to be upon the theory that because the bank loaned Sidway the money to pay off the Cleaver note and mortgage, that two essential things in the case were thereby accomplished:

1. That as to Clark, Sidway *had paid the note* and mortgage in July, 1875, and had thereby acquired a right of action against him; and

2. That for the purpose of conveying the real estate beyond Clark's reach and depriving him of all benefit of the transaction the note and mortgage were *not paid*, but passed to the bank by the assignment made by Sidway.

The court refused to instruct the jury that the agreement claimed by plaintiff if established, constituted a copartnership and that the accounts between them could not be adjusted in an action at law.

The conduct of the jury in failing to make any estimate of the damages and forgetting what plaintiff claimed and the action of the court in reducing the verdict to $4,000 after instructing it to find $6,700, shows the importance of not having this accounting made in an action at law.

Upon plaintiff's theory of the case, and upon his evidence, all the elements of a partnership were involved in the transaction. It was a trading venture in the which each party was to furnish half the capital, each was to have an equal share in the

profits, and each to share equally in the losses. Sidway's letter of October 15, 1872, contemplates a mere trading venture, with more to follow. The payments to be made and the amounts to be expended were indefinite. The sale of the property might be in parcels. The jury found their verdict on the statement of Sidway. If it was true that the purchase was made on the joint account of the parties in 1872, and the title was held by Sidway in trust until November, 1875, and was held in trust for Sidway until the final disposition of the property, in 1879, then it was a copartnership in which Sidway must account for the profits received in a proper action.

We cite the following cases involving the same principles, in which the parties were held to be partners:

Nicoll vs. Ogden, 29 Ill., 323.
Pierce vs. Shippee, 90 Ill., 371.
Kuhn vs. Newman, 49 Iowa, 424.
Remington vs. Allen, 109 Mass., 47.
Beauregard vs. Case, 91 U. S., 134.
1 Bates on Partnership, 52, and authorities cited.

"Whenever it appears that there is a community of interest "in the capital stock, and also a community of interest in the "profit and loss, then the case is one of actual partnership "between themselves and as to third persons."

Berthold vs. Goldsmith, 24 Howard, 541.

Aside however from any question of copartnership, there can be no question of the fact that, if Sidway's theory is true, he sustained the relation of a trustee toward Clark. Clark was a non-resident, and Sidway undertook to manage the property in their joint interest. He had no authority, and does not pretend to have had any authority from Clark, to indorse the note of Charles Cleaver with Clark's name. In this act he recognized the theory, and the bank had notice of the fact, that

he had paid off the Cleaver note for the joint benefit of himself and Clark. He recognized the fact that the title to that note, if it could be transferred for any purpose, could not be transferred without Clark's consent. If he was not a partner, he had no authority whatever from Clark to assign the note, and all that was done subsequently by the bank, to-wit, selling the note and foreclosing the trust deed, was simply void as to Clark, and Clark was entitled to an accounting for the amount ultimately realized from the lots.

We are aware that this court only sits for the correction of errors at law and cannot look into the general merits of this controversy, but it is because of these errors that gross injustice has been done the plaintiff in error in this case, and that a sharper has practiced his palpable frauds upon an unsuspecting and confiding friend, and now relies upon legal forms and pretenses to cover up his bad faith and to accomplish his ends.

In the case of *May vs. LeClaire's Executors*, 11 Wallace, 219, this court had occasion to examine into a sale under a power which was intended to defeat the rights of May under a certain contract. Notwithstanding numerous conveyances, this court looked through all the legal forms with which the transaction was clothed, and held the parties to account for the property. This court could see something in that case to prevent the success of the scheme to convey the property beyond May's reach. In this case the jury could have done the same but for the error in the instructions of the circuit court.

The pretended foreclosure and sale, under the trust deed of Charles Cleaver and wife, was without any notice to Clark. The bank directed the sale, and knew all that its president, Sidway, knew when he made the pretended assignment. The bank in fact held the property in trust for Sidway, and took the quit-claim deed from Lindgren for Sidway's use, knowing that Clark was entitled as to Sidway to share in the profits of a resale of the property. To hold Clark to pay one-half of the purchase

money, $10,000, with one-half of ten years' taxes on the property, and give Sidway the entire proceeds of the sale, is simply a gigantic fraud, and it would be a reproach on the administration of the law if successfully accomplished.

We have not discussed the question as to the right of Sidway to recover from Clark on the covenant of the deed or upon a verbal agreement to pay half the Cleaver note and mortgage, without first having made payment, because that point was conceded in the instructions of the court.

But in no event could Sidway claim that Clark should pay one-half of the amount secured by the trust deed until Sidway should pay or offer to pay the other half.

The entire undivided interest in the property was bound for the entire debt. The payment by Clark of the $4,000 would not discharge ~~the undivided half~~ any part of the property from the lien of the other half. As between Clark and Sidway, clearly Sidway had no right to demand payment by Clark of one-half until he (Sidway) was ready to pay the other half. The covenant in his deed required the payment by him of the other half of the debt. Clark had as much of a right of action against Sidway for not paying the one-half of the $8,000 as Sidway could possibly have against Clark for his (Clark's) failure. Sidway does not pretend that he ever offered Clark to join him in the payment of the Cleaver note and security.

As we are not advised upon what theory the plaintiff claims the right to recover $4,000 we must await his argument.

C. C. NOURSE, *with*
GEORGE L. PADDOCK,
Attorney for Defendant.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1888.

No. 1164.

EZEKIEL CLARK,
Plaintiff in Error,
vs.
LEVERETT B. SIDWAY, FOR USE OF LINDGREN,
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF FOR PLAINTIFF IN ERROR

IN OPPOSITION TO MOTION OF DEFENDANT IN ERROR TO DISMISS WRIT OF ERROR.

GEO L. PADDOCK,
ATTORNEY FOR PLAINTIFF IN ERROR.

C. C. NOURSE,
OF COUNSEL.

BARNARD & GUNTHORP, PRINTERS, CHICAGO.

Supreme Court of the United States.

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Error to the Circuit Court of the United States for the Northern District of Illinois.

OBJECTIONS OF PLAINTIFF IN ERROR

TO MOTION OF DEFENDANT IN ERROR TO DISMISS.

And now comes said plaintiff in error and says:

First. That it appears by the record herein that there are no grounds for said motion of defendant in error.

Second. That the matter in dispute in this court upon said writ of error exceeds the sum or value of five thousand dollars, exclusive of costs, as appears by the record herein.

Third. That the amount in controversy upon said writ of error and involved in the record sought to be reviewed by the said writ is sufficient to give this court jurisdiction of said cause and of said matters set forth in the record thereof.

Wherefore said plaintiff in error submits that said motion be overruled.

GEO. L. PADDOCK,
Atty. for Plff. in Error.

STATEMENT.

Calling attention to the matters of record shown in the "plaintiff in error's additional transcript" as well as to those in the abstract filed by defendant in error, the plaintiff in error submits that the grounds assigned in support of the motion are not in accordance with the facts.

To make the position of plaintiff in error clear upon this point he has given, at some length, not only a portion of the pleadings bearing upon his counter-claims, but sufficiently full extracts from the evidence offered in their support, and also extracts from the charge of the court. These, together, show the way in which the counter-claims were alleged, supported in evidence and submitted by the court to the jury.

The case was tried under a stipulation which entitled either party, without further pleading, to any demand against the other which the evidence would sustain. Hence it is not necessary to rest the case of plaintiff in error upon the pleadings as actually formulated. Aside, however, from this stipulation which has been set out by defendant in error upon this motion, the pleadings on the part of defendant below were technically ample for the purpose.

They comprised a general denial of the causes of action sued on by defendant in error; want of consideration; that the deed sued on was not otherwise delivered or intended than as a security for money loaned by plaintiff in error to defendant in error; and that the latter was indebted to the plaintiff in error in divers sums of money

specified, which he had not paid, to the damage of defendant below $10,000. These sums of money were claimed in the usual form of set-off in *indebitatus assumpsit* according to the local practice act.

Therefore, upon the face of the pleadings, Clark, the defendant below, claimed of Sidway, the defendant in error, ten thousand dollars, and recovered nothing. A reversal of the judgment upon this writ will, of course, reinstate Mr. Clark's claim of $10,000, and leave it a pending suit in the Circuit court.

But this is not all. If we look into the evidence and the charge to the jury it is made plain that the issue between the parties was not whether Clark had received proper credits upon an account of purchase of the land by Sidway and himself, but whether in fact there had ever been such a purchase. Mr. Clark denied such purchase, and claimed that the funds paid by him on Sidway's drafts were loans provable under his cross-pleadings. Sidway insisting that Clark had finally concluded to become a joint purchaser made no dispute as to these payments, but treats them (see page 9 of additional record) as credits in Clark's favor upon the joint account. But that was *his* side of the case and not Clark's.

It is noted that Sidway, on January 1, 1878, in one of his "accounts," figured these sums so advanced by Clark, including interest, at $3,314.85.

The MATTER IN DISPUTE was (and is) the exoneration of plaintiff in error from the claim of defendant in error (which has been ascertained by the judgment to be $4,000), and in addition thereto the fixing of a liability by judgment in favor of plaintiff in error against defendant in error to the full amount of the cross-claims. These, we

have seen, are alleged at $10,000, and shown in the bill of exceptions to have amounted in cash, with interest, to over $3,000.

Thus, whether the test be applied to the amount unavailingly claimed in the cross-pleadings, or whether to the evidence of actual cash advanced in support of the pleadings, the cross-demand is a part of the matter in dispute, and, when added, enhances the matter in dispute so that it exceeds $5,000, exclusive of costs.

A glance at the charge of the court will illustrate the above positions. (See Additional Record, pp. 16, 17, etc.)

The court speaks of the single issue between the parties. The question was put to the jury whether the plaintiff should recover what he claims, about $6,700, provided the main issue be found for plaintiff that Clark became a purchaser, or whether finding that issue for Clark, the latter should recover of the plaintiff below the $2,600 advanced and interest.

The statute of set-off in force in Illinois, 2 Starr & Curtis, R. S., p. 1791, PRACTICE § 29, provides:

"The defendant in any action brought upon any contract or agreement, either expressed or implied, having claims or demands against the plaintiff in such action may plead the same, * * * and the same or such part thereof as the defendant shall prove on trial shall be set off, and allowed against the plaintiff's demand, and a verdict shall be given for the balance due. And if it shall appear that the plaintiff is indebted to the defendant the jury shall find a verdict for the defendant, and certify to the court the amount so found, and the court shall give judgment in favor of such defendant with the costs of his defense."

"§ 30. When such plea * * * of set-off shall have been interposed the plaintiff shall not be permitted to dismiss his suit without the consent of the defendant or leave of the court."

We therefore think defendant in error is not entitled to limit the matter in dispute to the amount recovered by himself, as that recovery necessarily involved his exoneration from the cross-demands, which the case shows depended upon the same issue upon which the jury tried the case and judgment was rendered.

We think there is no case cited by counsel upon the motion which sustains the right to a dismissal under such circumstances.

Nor, in our judgment, is it relevant or correct to remark (p. 6, brief), that the "record shows an allowance of the "counter-claims insisted upon by plaintiff in error of "about $2,600 with interest thereon"—alluding, as we understand the context, to the gratuitous *remittitur* by the plaintiff below.

That sort of "allowance" had already been accorded by Mr. Sidway in stating his demand at $6,700 after "crediting the cash as "payments" on the "joint account;" to deduct "about $2,600, with interest thereon," in addition to Sidway's "credits" on the "joint account" would hardly seem explainable upon the basis suggested by counsel, because that would be using the same items twice: once as "credits" in Sidway's version of the matter, and again as a "counter-claim," or *remittitur*.

Now that was not the kind of allowance demanded by the cross-claimant, because it was not a judgment against Sidway for the full amount, coupled with that complete exoneration from the claim of Sidway which the court properly said was dependent upon the same issue.

After the *remittitur*, it is obvious that Mr. Clark was $4,000 worse off than he would have been had neither party recovered anything from the other. Had he de-

feated Sidway altogether, and at the same time recovered his counter-claim of about $3,000 (which he must have done had he defeated Sidway), he would have been about $7,000 better off than he now is.

That $7,000 (if we are to look into the evidence and not the pleadings alone) is the matter in dispute before this court. The errors assigned are intended to question the ruling of the court in submitting that matter to the jury. Yet we are told the matter now in dispute is not in excess of $5,000.

If, disregarding the merits on this question of jurisdiction, we attend only to the cross demand set up in the plea of set-off, viz: $10,000 there is a sufficient sum in dispute, as nothing was allowed upon that cross-demand.

Upon an examination of the cases cited by defendant in error in support of the motion (Brief, page 3) we are not able to perceive that any of them involved in its facts the question of adding the amount of the *rejected* counter-claim to the amount of the judgment *recovered* as the measure of jurisdictional value. They appear to have been cases of judgments without counter-claims.

When, as in the case at bar, the set-off of the defendant is a claim to a judgment upon the basis of a total denial of plaintiff's claim, the claim and counter-claim appear so blended as to become an entire controversy, because the court cannot allow one without rejecting *in toto* the other.

In the present case had Clark recovered less than $5,000, say $3,000, we submit that Sidway would have had the same right to a writ of error which we are now claiming for Clark. Then, as now, the matter in dispute would exceed $5,000, and for the same reasons. Clark,

therefore, claims no advantage over Sidway under the issues in the case upon the question of jurisdiction because, as has been already noticed, had Clark prevailed he would have prevailed without "allowing" Sidway a dollar, and only by totally defeating the latter's demand.

Plaintiff in error cites against the motion:

Ryan v. *Bindley*, 1 Wall., 66.

Lamar v. *Micou*, 104 U. S., 465.

Dushane v. *Benedict*, 120 U. S. 630.

In *Ryan* v. *Bindley*, it seems to us that the judgment of $575 recovered by the plaintiff was treated in law as forming with the cross-claim an entire matter in dispute.

In *Dushane* v. *Benedict*, the defendant sued out writ of error on a judgment for about $800, having been defeated on his counter-claim of $7,000. The motion to dismiss was denied, and the case reversed upon the errors assigned. Here again, as it seems to us the judgment and cross-claim were treated as entire for purposes of jurisdiction.

In *Lamar* v. *Micou*, there was a decree for less than $5,000 and defendant appealed. This court says, in dismissing the appeal: "There is no claim of set-off or "counter-claim, *except to reduce the amount of the recovery.* "*In no event can he get any money decree in his favor.* All "he seeks to do is to defeat the claim of the appellee. "Consequently the amount in controversy, so far as this "appeal is concerned, is fixed by the decree. *Thompson* "v. *Butler*, 95 U. S., 694."

Is it not fairly implied in the above language that where the defendant denies *in toto* the plaintiff's claim and as-

serts a counter-claim which is denied *in toto* by the plaintiff, the judgment in favor of the plaintiff is upon appeal, a matter in dispute equal to the sum of the opposing claims? It seems correct to say that the appellant has lost both suits, and seeks by reversal to win both on a new trial.

Whether that reasonable rule be applied, or whether the amount claimed in the defeated plea of set-off be taken as the test, it is respectfully submitted that the motion should be denied.

GEO. L. PADDOCK,
Atty. for Plff. in Error.

C. C. NOURSE,
of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1888.

No. 1164.

EZEKIEL CLARK,
Plaintiff in Error,

vs.

LEVERETT B. SIDWAY, FOR USE, ETC.
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

MOTION OF DEFENDANT IN ERROR TO DISMISS, AND BRIEF IN SUPPORT.

JNO. N. JEWETT,
ATTORNEY FOR DEFENDANT IN ERROR.

BARNARD & GUNTHORP, PRINTERS, CHICAGO.

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And now comes the said defendant in error Leverett B. Sidway by Jno. N. Jewett, his attorney, and moves the court to dismiss the writ of error heretofore issued in the above entitled cause and for grounds of said motion states and shows to the court:

First. That the amount of the judgment from which said writ is prosecuted is less than the sum of five thousand dollars, to wit: the sum of four thousand dollars.

Second. That the amount involved in the record sought to be reviewed by the said writ of error is insufficient to give this court jurisdiction of said cause or of the matters set forth in the record thereof.

For which reasons, and others appearing upon the face of the record, the said defendant in error moves the court to dismiss the writ of error in said cause.

JNO. N. JEWETT,
Atty. for Deft. in Error.

Supreme Court of the United States.

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For which reasons, and others appearing upon the face of the record, the said defendant in error moves the court to dismiss the writ of error in said cause.

JNO. N. JEWETT,
Atty. for Deft. in Error.

STATEMENT.

The declaration in this case shows that the action was founded upon an assumption clause in a deed from the defendant in error to the plaintiff in error, purporting to convey an undivided one-half of certain premises near Chicago, subject to one-half of an incumbrance of $8,000, which the grantee assumed and agreed to pay.

The plaintiff in error (defendant below) in his defense undertook to repudiate the purchase, and claimed that the deed was delivered to him as a security for money merely, and set up a counter-claim amounting in round numbers to about $2,600. The special pleadings are rendered unimportant, by a stipulation filed in the cause before the trial, which, although omitted by mistake from the transcript of the record certified to this court has been supplied by an agreement of the parties which is now on file. The stipulation provided that "under the several "pleas and pleadings now on file herein and without "necessity on either side for further argument or amend- "ment thereof, the parties, plaintiff and defendant, shall "be mutually entitled to make any claim or demand ap- "plicable and proper under any form of pleadings so- "ever, so that the claims, demands, counter-claims and "defenses of the said parties respectively may be fully "presented to the court and jury upon the evidence in "the case."

The cause was tried at the March term, 1888, before the court and a jury, the verdict of the jury being for the plaintiff below, assessing damages at the sum of $6,-

700.75. A motion for a new trial was made by the defendant, and upon the decision of that motion, the court intimating an opinion in that direction, the plaintiff remitted from the verdict $2,700.75, and thereupon judgment was rendered against the defendant for $4,000 and costs. The defendant below sued out the pending writ of error, which this court is now asked to dismiss. The reason for the motion may be stated as follows:

The amount of the judgment from which the writ of error is prosecuted, is not sufficient to entitle the plaintiff in error to a review, in this court, of the record upon which that judgment was founded.

This proposition covers the specific reasons assigned in the motion, and in support of it, the following cases are referred to:

Thompson v. *Butler*, 95 U. S., 694.
Hilton v. *Dickinson*, 108 U. S., 165.
Opelike City v. *Daniels*, 109 U. S., 108.
Ala. Gold Life Ins. Co., v. *Nichols*, 109 U. S., 232.
Dows et al. v. *Johnson*, 110 U. S., 223.
1st Natl. Bk., &c., v. *Redick*, 110 U. S., 224.

The findings of the jury disposed of all the questions of fact in the case. Those findings will not be disturbed in this court. The allowance of the *remittitur* was a matter entirely within the judicial discretion of the trial court. The authority of this court to review a judgment of an inferior court, either upon appeal or writ of error, does not attach until that judgment has been rendered.

The result of the cases above referred to would seem to be a settled doctrine, that the *amount of the judgment* from

which a writ of error is prosecuted in all cases when a money recovery only is sought, determines the jurisdiction of this court to consider the errors assigned, when the writ of error is sued out by the defendant in the judgment, unless it was made to appear that he had pleaded and shown by way of offset or counter-claim, a demand against the plaintiff, which had been disallowed to an amount which *by itself* would give to this court appellate jurisdiction, and, however the language of the several opinions may have expressed the conclusion of the court, the result, as it is now claimed, is consistent with the settled fact, that *a writ of error is the beginning of a new suit and not the prolongation of an old one.*

The last Congress passed an act, which was approved February 25, 1889, and which reads as follows: "That "in all cases where a final judgment or decree shall be "rendered in a Circuit court of the United States, in "which there shall have been a question involving the "jurisdiction of the court, the party against whom the "judgment or decree is rendered, shall be entitled to an "appeal or writ of error to the Supreme court of the "United States to review such judgment or decree "without reference to the amount of the same; *but in* "*cases where the decree or judgment does not exceed the* "*sum of five thousand dollars, the Supreme court shall not* "*review any question raised upon the record, except such* "*question of jurisdiction.*"

This act, so far as it relates to the dependency of jurisdiction upon amounts involved, would seem to be only declaratory of the law as it was before the passage of the act, as stated in the cases above referred to.

The case of *Thompson* v. *Butler*, 95 U. S., 694, seems to be the one relied upon by this court in subse-

quent cases as settling the question of jurisdiction. No intelligent attorney, however, would claim for that case, (if he treated the court fairly) more than an application of the doctrine stated, to the special facts of the case itself, except by way of argument, and, in that case, it does not appear that there was, on the part of the defendant below, any counter-claim or claim of offset.

The court, however, says, (page 695): "Our jurisdiction cannot be invoked until the final judgment below has been rendered; and we cannot open the record to look for errors *until jurisdiction has been established.* The court below retains full control of a cause until final judgment has been entered; and it follows that if for any reason a judgment is given against a defendant *in a case involving the plaintiff's cause of action alone, unaffected by counter-claim for set-off, or a sum less than our jurisdictional amount, we have no power, at the instance of the defendant, to correct errors that may have been committed in settling the amount we can only look at the verdict through the record; and, if the record is closed to us, so necessarily must be the verdict.*"

Further on, the court says: "Necessarily, verdicts are, to some extent, subject to the control of the court. *It is not unusual for a court to announce that a new trial will be granted unless a part of a verdict shall be remitted, and to enter judgment upon the reduced amount, if the suggestion is followed. All such matters may properly be left to the sound judicial discretion of the court in which the trial is had.*" I do not stop the quotation here, because of any apprehension of what follows. The case illustrates itself, and as it has been sanctioned by reference, in more recent cases, decided in this court, it may be assumed that this court is

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committed to whatever the case itself justified the court in positively deciding; and amongst those things, it certainly could decide and did decide, that *with the consent of the court* (of which the record would be sufficient evidence) *the plaintiff could remit from the verdict of a jury an amount*, which would place the case without the appellate jurisdiction of this court *unless* it was made to appear that the *remittitur* was for the purpose of ousting the appellate jurisdiction.

It would hardly be proper upon this motion to attempt an analysis of all the cases bearing upon the question of jurisdiction. The cases already cited and others referred to in the opinions of this court, seem to have adopted the rule laid down by Mr. Justice Iredell in his *dissenting* opinion in the case of *Wilson* v. *Daniel*, 3 Dallas, 401, that "the matter in dispute here meant" (viz: the matter giving jurisdiction) "*is the matter in dispute on* "*the writ of error*," AND THAT AMOUNT MUST BE the amount of the judgment, when the writ of error is sued out by the defendant to that judgment, certainly unless it is made to appear that his counter-claim or offset up to the *jurisdictional amount* has been disregarded in the judgment rendered against him. This record presents no such case. On the contrary, it shows *an allowance* of the counter-claim or offset insisted upon by the plaintiff in error of about $2,600, with interest thereon, and a verdict of the jury in favor of the defendant in error, after allowing for said counter-claim or offset, reduced by a *remittitur at least approved by the court*, to four thousand dollars ($4,000), for which amount judgment was rendered. It is this amount which "*is the matter in dispute on the writ of error*."

The language of the court in the case of *Thompson* v.

Butler, 95 U. S., 694, then becomes applicable here, viz.: "If, however, the reduction is permitted, the errors "of the record will be shut out from our re-examination "in cases where our jurisdiction depends upon the "amount in controversy."

This language is quoted with approval in *Opelika City* v. *Daniel*, 109 U. S., 108, and in *Ala. Gold Life Ins. Co.* v. *Nichols*, 109 U. S., 232.

In *Dows et al.* v. *Johnson*, 110 U. S., 223, the action was apparently trover, for the conversion of 10,000 bushels of corn valued at $6,000 and amounting with interest to $6,360 at most. The judgment recovered was only $2,430, and the plaintiff below sued out the writ of error, which was dismissed for want of jurisdiction.

The question of jurisdiction in this court seems to have been very fully considered in *Hilton* v. *Dickinson*, 108 U. S., 165, and the authorities carefully reviewed. The opinion in effect says that the case of *Gordon* v. *Ogden*, 3 Pet., 33, overrules the case of *Wilson* v. *Daniel*, 3 Dallas, 401, and establishes the doctrine contended for by Justice Iredell in his dissenting opinion in the latter case, and then proceeds (p. 175): "Under this rule we have "jurisdiction of a writ of error, or an appeal by a plaint-"iff below, when he sues for as much as or more than "our jurisdiction requires *and recovers nothing or recovers "only a sum, which being deducted from the amount or "value sued for, leaves a sum equal to or more than our "jurisdictional limit for which he failed to get a judgment "or decree.*

"And we have jurisdiction of a writ of error or appeal "by a defendant, *when the recovery against him is as much*

"*in amount or value as is required to bring the case here,*
' and when *having pleaded a set-off or counter-claim for*
" *enough to give us jurisdiction, he is defeated upon his*
" *plea altogether, or recovers only an amount or value,*
" *which being deducted from his claim as pleaded,* leaves
" *enough to give us jurisdiction which has not been allowed.*"

Applying this rule to the pending case, the writ of error being sued out by the defendant below, and the jurisdiction cannot attach for the following reasons:

1st. The offset or counter-claim set up by the defendant below was less than the jurisdictional amount.

2d. The set-off or counter-claim was fully allowed by the jury and court in the adjustment of the accounts between the parties.

3d. The amount of the judgment from which the writ of error is prosecuted is less than the jurisdictional amount.

4th. The set-off or counter-claim having been allowed in full, the case, as respects the jurisdiction of this court, stands precisely as it would have stood if no set-off or counter-claim had been pleaded, and judgment had been recovered for less than the jurisdictional amount.

Several of the cases above referred to are cases in which *remittiturs* from the verdicts of juries in excess of the jurisdictional amount had been permitted by the trial court, which reduced the findings and judgments below the amount required to give this court jurisdiction, and the court says that when such remittitur is made without any purpose of depriving the court of jurisdiction, the practice is a proper one, and, *at any rate*, it is wholly a matter within the discretion of the trial judge. In addition to the statement already made, that in this case the

remittitur was entered upon the suggestion of the trial judge it must be apparent from the amount remitted that no such purpose could be attached to it; for if that had been the object it would have been accomplished quite as well if the remittitur had been about one thousand dollars less than it actually was.

For these reasons it is respectfully submitted that this court has no jurisdiction to consider the matters involved in the writ of error in this cause, and that the writ should be dismissed.

JNO. N. JEWETT,
Atty. for Deft. in Error.

NOTE: I have been in doubt as to the extent to which it is necessary to print the record for the purposes of the motion to dismiss. After conferring with the clerk I have printed such portions only, as he sent me, together with agreement of counsel relating to the pleadings referred to in the beginning of the foregoing statement and brief.

JNO. N. JEWETT.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1888.

No. 1164.

EZEKIEL CLARK,
Plaintiff in Error,
vs.
LEVERETT B. SIDWAY,
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

REPLY TO BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS.

JNO. N. JEWETT,
ATTORNEY FOR DEFENDANT IN ERROR

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REPLY TO BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS.

The printing by the plaintiff in error of additional parts of the record, for the purposes of the hearing of the motion to dismiss the writ of error in this case, relieves me of some embarrassment I felt in writing the original brief. It may now be confidently assumed, I suppose, that *all* the parts of the record necessary to be considered upon the motion, are printed and before the court, and *as a result* the motion, as I think, is now more favorably presented for consideration, and for the reason that *the additional record shows exactly what the counter claim or set-off of the plaintiff in error* was both in the testimony and in the charge of the Circuit judge.

If the court will look at page 9 of the additional record of plaintiff in error, it will find a statement rendered by Mr. Sidway to Mr. Clark, about January 1, 1878, in which two items of credit are allowed to Mr. Clark, with the interest thereon, viz: one of $2,021.40, under date of October 18, 1872, and the other of $450, under date of December 11, 1877. The last date is prior to the final settlement by Sidway of the amount of the $8,000 incumbrance on the property secured by the Cleaver trust deed, subject to which the property was purchased in 1872. In addition to this, on pages 16 and 17 of the *additional record of plaintiff in error* is set out a part of the charge of the circuit judge, in which is stated the same two items as composing the counter claim of Mr. Clark.

The portions of the record, as now printed, show the exact claims made upon the trial below by the respective parties.

Mr. Sidway claimed that he and Clark were purchasers together of the Cleaver lots in 1872, subject to an incumbrance of $8,000; that Clark furnished the purchase money over and above the incumbrance, viz: $2,021.40, on October 18, 1872, and subsequently, and on December 11, 1877, paid $450 more on account of expenses of conveying the property.

All expenses, including taxes, assessments and interest on the incumbrance had been paid by Sidway, and the amounts so paid by Sidway for carrying the property and interest thereon up to the 1st day of January, 1878, exceeded the two amounts advanced by Clark and interest thereon, by the sum of $1,737.12, one-half of which was due him from Clark. This the *account rendered*, above referred to, shows. It was after this, of course, that the claims under the Cleaver deed of trust for $8,000, were adjusted and

paid in full by Mr. Sidway. Mr. Sidway's claim against Mr. Clark consisted, as his statement of January 1, 1878 (so far as it reached) illustrates, of one half of the expenses of carrying the property from the date of the purchase (all of which were paid by him), with interest thereon, and one-half of the amount paid by him in settlement and discharge of the Cleaver trust deed and interest thereon, one-half of the two sums of $2,021.40 and $450, respectively, paid by Clark, and interest thereon from the time of their payment. This is shown in clear outline in the part of the charge of the circuit judge to the jury, set out on pages 16 and 17 of the *additional printed record*.

It is thus fairly apparent that no question was ever made by Sidway as to the amounts, which had been proved by Clark, and that he had allowed those amounts in estimating the extent of Mr. Clark's liability to him, does not admit of question.

The *sharp controversy* in the case before the jury, was over a question of fact, viz: was Mr. Clark jointly interested with Mr. Sidway in the purchase of the Cleaver property? *If he was*, the two sums paid by him to Mr. Sidway were confessedly payments made on account of the purchase. *If he was not*, the sums so paid were a loan to Mr. Sidway, to be recovered with interest, under the pleadings in the case. This question of fact being determined, the amount of the verdict and judgment, either way, was a mere matter of figures and calculation. *The jury determined this main issue in favor of Mr. Sidway*, the defendant in error.

I do not understand that this court will ever look into the record of the case, to determine whether that finding

of the jury was right or wrong. If it is proper, upon this motion, I respectfully submit, that the charge of the court to the jury, as presented in the *additional* printed record, shows that this *main question* was fairly stated, and that no complaint, in this respect, can reasonably be made by the plaintiff in error.

It is a matter of regret that I failed to make intelligible to the learned counsel on the other side, my position, thought to be decisive of the motion to dismiss. The *scant record*, which I had caused to be printed, under conditions stated, was a constant embarrassment to me in the writing of the original brief. *The deficiencies of that scant record* (if it was such, in fact,) have now been supplied, and the suggestions of counsel upon this amended record, are understood. These suggestions seem to be:

1st. That in a *formal* pleading, which was superseded *as to its effects*, by a stipulation, the plaintiff in error claimed an offset of $10,000, and that the difference between this *nominally* pleaded amount, and the amount of the two items of $2,021.40, and $450 allowed, is an amount which involves the jurisdiction of this court. 2d. It is claimed that the amount recovered, viz: $4,000, and the counter claim of the plaintiff in error, *put together*, exceed the jurisdictional amount, and therefore the motion to dismiss should be overruled.

The printed portions of the record, as now presented, show, that the counter-claim or offset (the specific name is unimportant) consisted of the two items of $2,021.40 and $450 already referred to. There was no claim for *consequential* damages, growing out of the violation of an admitted contract, such, as by analogy even could be

likened to the claim so elaborately discussed in the case of *Dushane* v. *Benedict*, 120 U. S., 630. It should be assumed, that that case was properly decided upon the facts before the court. The simple suggestion is, that the opinion has no relation to the present case.

Covering the brief of counsel on the other side as well as I can, and briefly, and trying to keep in view the printed portions of the record as the only parts to be considered (and I think they are) for the purposes of the pending motion, and it being conceded that special pleadings were waived with all just rights protected to either party upon the trial, it is somewhat difficult to understand how a *bald and mere special claim of set-off*, stated at the sum of $10,000 can be insisted upon as a ground of jurisdiction, when the record, presented by the party insisting upon the point shows, that the offset in fact only amounted to the sum of about $3,300, including interest. In this view of the motion the court is confronted, not with the *special claims*, made in formal pleadings, *which indicate nothing*, but with *actual claims* as made upon the trial of the cause. The statute of Illinois, as quoted in the brief of counsel is without application, and comment upon it should be unnecessary.

But on page 5 of his brief, counsel, referring to my former suggestions in support of the motion to dismiss, say: "Nor in our judgment is it relevant to remark "(p. 6, brief,) that the record shows an allowance of the "counter-claims, insisted upon by plaintiff in error, of "about $2,600, with interest thereon. Alluding, as we "understand, to the gratuitous *remittitur* by the plaintiff "below."

The quotation with the paragraph, which immediately follows it, is a misapprehension of what I said, or, at least,

of what I intended to say. The idea I sought to convey, however imperfectly it may have been expressed, was, that the full amount of the counter-claim of the plaintiff in error, which, upon the trial, appeared to be about $2,600 and interest, was allowed by the jury in the verdict rendered by them. I made the suggestion with some hesitation. Simply because the record, so far as I had caused it to be printed, did not clearly show the fact as I stated it. The additional record, printed by plaintiff, in error, entirely relieves me of the *hesitation* which I felt in making the statement before. That the jury allowed this counter-claim to the full extent of it, is practically admitted as well as shown, and that it was entirely independent of the *remittitur*, entered under an intimation of opinion by the trial court, is now made *visibly* certain.

The decision of this court upon the motion to dismiss, must therefore, be predicated upon these facts, viz: 1st. The main issue in the case was determined by the jury in favor of the defendant in error. 2d. That issue having been settled in favor of the defendant in error, the jury in adjusting the question of indebtedness between the parties under the evidence, after allowing to the plaintiff in error (the defendant below), the *full amount* of his counter-claim or offset of $2,600 and interest, found and allowed against him and in favor of the defendant in error *as damages* for breach of his contract, the sum of $6,700.75. 3d. That the entire claim of the plaintiff in error, by way of offset or counter-claim was less than the jurisdictional amount of the court. And, therefore, under the decisions of the court could not, *even if it had been disallowed*, be made the occasion of an appeal or writ of error. 4th. That the *remittitur* was wholly independ-

ent of the counter-claim or offset, and that it was not made *voluntarily*, but under advice of the court, and thereby the judgment was reduced below the amount necessary to give jurisdiction to this court.

Under such circumstances, the *nominal* amount claimed in a technical plea of off-set merely, (certainly when superseded by a stipulation practically waiving all special pleadings), cannot be of importance in the settlement of the question of jurisdiction.

As to the second point made by the counsel for plaintiff in error, it is perhaps sufficient to say, that, under the authorities cited in my former brief, the statute relating to the jurisdiction of this court does not permit the plaintiff in error to tack onto the amount of the judgment against him the amount of his offset or counter-claim, (*which has been fully allowed* in the adjustment of the verdict and judgment), in order to reach the jurisdictional amount. When an offset is pleaded, and the judgment against the defendant is less than $5,000, the rule seems to be, that the defendant cannot have a writ of error, unless it appears *that a portion of his offset as claimed and shown by proof, larger than the jurisdictional amount, has been disallowed.* The rule and the record both require, that the writ of error in this case should be dismissed.

JNO. N. JEWETT,
Atty. for Deft. in Error.

Office Supreme Court U. S.
FILED.
NOV 25 1891
JAMES H. McKENNEY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1891.

No. 140.

EZEKIEL CLARK,
Plaintiff in Error,
vs.
LEVERETT B. SIDWAY FOR THE USE ETC.,
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

BY

JOHN N. JEWETT.

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STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

I.

This action was commenced in the court below, in October, 1880, by the late Francis H. Kales, Esq., as attorney for the defendant in error. He was an attorney of large reputation in the city of Chicago, and commenced no lawsuits without reasonable ground for anticipating favorable results to his clients. Upon his death, I was substituted in his place, as the attorney for the defendant in error, *the plaintiff below*. Since then, the case has been tried twice in the Circuit court, each time the Honorable Romanzo Bunn, of Wisconsin, being the presiding

judge. The first trial, as the record shows, resulted in a disagreement of the jury. The second trial resulted in a verdict in favor of the defendant in error, for the sum of $6,700.75. A motion for a new trial having been interposed, the defendant in error, upon the suggestion of the court, remitted from the verdict the sum of $2,700.75, and judgment was rendered against the plaintiff in error for the sum of $4,000 and costs; and it is *from that judgment*, that the present writ of error is prosecuted. By a stipulation, which appears in the bill of exceptions and is made part of the record in this case, (page 17), it is shown, that there was a proceeding in chancery instituted by Mr. Clark against Mr. Sidway in the same court, having relation to the same controversy between the parties, as is involved in this proceeding. The stipulation immediately relates to the use of testimony and exhibits offered in the chancery case, and shows that the latter case had been terminated. It speaks of that case as "lately pending "in the same court." This reference to the chancery case justifies, perhaps, the explanation, that shortly after the institution of the present suit, Mr. Clark presented and filed in the Circuit court his bill, involving the same matters here in controversy, and praying for an injunction against the prosecution of the action at law. A preliminary injunction was allowed; the case was afterwards heard upon its merits; the injunction dissolved; and the bill dismissed. Pending that injunction, the suit at law was, of course, suspended. The two trials, above referred to, were subsequent to the disposition of the chancery proceedings. It is thus made to appear upon the face of the record by the orders of the court and the stipulation of the parties, that there have been three trials of this controversy upon its merits, spreading over a

period of more than eleven years. *It is time, that this litigation was ended.* The amount involved, and to which the controversy is now reduced, has become *too small* to justify further and more protracted litigation; and, it is respectfully submitted, that this court should end the litigation, either by a dismissal of the writ of error, *as involving an amount not within the jurisdiction of this court*, or by an affirmance of the present judgment upon its merits.

STATEMENT OF FACTS.

The whole controversy grows out of the purchase of two lots in, or near to, the city of Chicago, in August, 1872; the title to which came from Charles Cleaver and wife to Mr. Sidway, by warranty deed, *subject*, however, to an incumbrance made by Cleaver and wife to Benjamin Gallup, as trustee, dated July 1, 1870, to secure a loan of $8,000, evidenced by Cleaver's note, payable five years after date, with interest at ten per cent. per annum, payable semi-annually. This incumbrance, by stipulation contained in the deed from Cleaver to Sidway, *Sidway assumed and agreed to pay*. The purchase was claimed by Sidway to have been made for the joint account of himself and Mr. Clark in equal interests, the whole purchase price being approximately $10,000, the deviation from that sum being simply a small accumulation of interest upon the incumbrance at the time the purchase was consummated.

The deed from Cleaver and wife to Sidway was dated on or about the 12th day of August, 1872. It was claimed by Sidway, and the record, at least, tends to show, that this purchase was made by him in pursuance of a previous understanding with Clark that he, Sidway, should make some investment in Chicago property for their joint account; that after the purchase had been consummated, and some time early in October of the same year, he advised Mr. Clark of the purchase, which had been made, and drew upon him for the amount of the purchase money, $2,031.40, over and above the incumbrance, which was assumed. The draft was paid by Mr.

Clark, after some hesitation and some correspondence between the parties in reference to it. Subsequent to that, interviews took place between the parties in relation to this purchase, and the claim of Mr. Sidway was and is, that Mr. Clark finally waived his objections, such as he may have interposed at the beginning of the transaction, and agreed to become jointly interested with Mr. Sidway in the purchase. Mr. Clark lived and did business, as a banker, at Iowa City, in the state of Iowa. Mr. Sidway resided in Chicago, and was, at the time, an officer of the Illinois Trust and Savings Bank, a banking institution of Chicago; he was also, to some extent, a dealer in lands in and in the vicinity of the city, and by reason of his relations to park improvements, which were then in progress, he being one of the park commissioners, he was presumed to have and probably did have, as reliable information as any one, in respect to the improvements in progress and in contemplation, which might have a favorable bearing upon the future value of real estate. It also appears that, for several years prior to this transaction and until it culminated in a practical disagreement between the parties, they had been on friendly terms, both in social and in business relations.

In addition to the sum of $2031.40 advanced by Mr. Clark upon the original purchase of the lots, Mr. Clark subsequently paid, on account of the expenses, interest and taxes in carrying the property, *upon the draft of Mr. Sidway*, the sum of $450. The interest upon the incumbrance and the taxes upon the property, with the exception of this $450, all appear to have been met by Mr. Sidway, until the amount that he had expended in carrying the property, was considerably in ex-

ess of the amounts, which had been paid by Mr. Clark. This is shown by the statements, some of which appear in the record on pages 21 and 22. The correctness of these statements is not questioned. *The incumbrance* matured on the 1st day of July, 1875, and it became necessary, then to provide for it. Neither of the parties, lthough men of considerable means, seems, at that particular time, to have been in a condition to desire to pay off the incumbance, and an arrangement was made by Mr. Sidway with The Illinois Trust and Savings Bank, to purchase the Cleaver note and hold it as collateral security to Mr. Sidway's personal note for the same amount. When the note was taken out of the hands of the holder of it, under this arrangement, Mr. Sidway endorsed it, in his own name and in the name of Mr. Clark. To Mr. Sidway's personal note was appended the usual authority to the bank to sell the collateral for the purpose of paying the principal obligation of Mr. Sidway. The matter remained in this position from July 2, 1875, until early in the year, 1879 when in the absence of Mr. Sidway—he being at that time in Europe—the bank sold the collateral—the Cleaver note and its security—and it was purchased by one John R. Lindgren, for the sum of $2.000. The net result of the sale was credited upon Mr. Sidway's personal note, and the balance of that note, along with other transactions pending, as between him and the bank, were settled and adjusted by Mr. Sidway, after the commencement of this suit, and his individual note was paid. Mr. Sidway's relations to the bank, as an officer, terminated in 1877. (Rec., 25.)

This summary outlines the conditions and results of the transactions, with this further statement, that subsequently

to the sale of the Cleaver note, and on July 15, 1879, the original incumbrance was foreclosed by a sale of the property, the sale having been regularly made by Mr. Gallup, the trustee in the trust deed securing the original Cleaver note. (Rec., 34.) At this sale the lots were bought by Mr. Lindgren for $2,000, and the proceeds credited upon the Cleaver note, leaving a large amount unpaid, and a large obligation resting upon Mr. Sidway, growing out of the purchase of the lots, one-half of which Mr. Clark had assumed in the deed executed and delivered to him by Sidway and wife, as is next shown.

At the time of the arrangement made with the bank for taking up and providing for the incumbrance of $8,000, as above recited, Mr. Sidway says, that Mr. Clark requested a conveyance to himself of an undivided one-half interest in the lots, and, on the 23d of November, 1875, Mr. Sidway and wife executed to Mr. Clark a general warranty deed of an undivided one-half of the two lots, which Mr. Sidway caused to be recorded in the recorder's office of Cook county, Illinois, and forwarded to Mr. Clark at Iowa City shortly after. The deed was received by Mr. Clark, and so far as the record shows, is still in his possession. The deed recited the incumbrance of $8,000., subject to which title had been taken by Mr. Sidway, with an agreement on his part to pay the same, and contained the provision, that Clark assumed and agreed to pay and save the said Sidway harmless from, one-half of said incumbrance, and of the interest thereon from the 12th day of August, 1872, and assumed and agreed to pay one-half of any further liability that Sidway might be under in consequence of the provisions of said trust deed. *It is upon this assumption clause in the*

deed from Sidway and wife to Clark that the presen action is predicated.

The entire transaction, with all its incidents and consequences, as thus briefly outlined, was consummated more than a year before the commencement of this suit in October, 1880. The note of Cleaver in the meantime remained in the possession and ownership of Mr. Lindgren, and the action was, therefore, commenced in the name of Sidway for the use of Lindgren.

The theory of Mr. Sidway's case has been and is, that Mr. Clark was jointly interested with him in the purchase of the lots; that he had been compelled to provide for the entire original incumbrance upon the lots of $8,000, together with interest and expenses of carrying the property, amounting in the aggregate to a considerable sum *in excess of all the moneys paid on account of the purchase and expenses by Mr. Clark*, and that he was entitled to recover from Mr. Clark for the benefit of the holder of the Cleaver note one-half of this excess by reason of Mr. Clark's relations to the original transaction, and *especially* one half of the Cleaver note, by reason of the assumption clause in his deed to Clark.

The defense to these claims of Mr. Sidway, pressed upon the hearing of the case, in the court below, was simply and baldly, that Mr. Clark, *as a matter of fact*, had no connection with the purchase of the lots; that the moneys advanced by him were simply loans of money to Mr. Sidway, and that the deed of November 23, 1875, from Sidway and wife to Clark was, simply, by way of security for such advances. These questions of fact, *it must be assumed*, were submitted to the court in the chancery proceedings already referred to. *They were the questions of fact*, as the record shows, which were submitted to the jury upon

the trial of the present case in the court below. The issues of fact were determined in the chancery case and by the verdict of the jury, against the claims of the plaintiff in error, and for the purposes of a hearing in this court, the findings of the jury, in these respects, are assumed to be conclusive; so that the only questions left for consideration upon the present argument, are questions of law applicable to the facts thus ascertained.

I do not propose to reproduce from the record any part of the correspondence, which took place between the parties with reference to this property. It may as well be read from the record as from a brief; but I call the attention of the court to such portions of that correspondence, as are set out on pages 22 to 25 of the printed record, which show, as I apprehend it, the relations between the parties themselves, and very clearly, *from the admissions of Mr. Clark himself*, their relations to the purchase of the Cleaver lots. There is no pretense for claiming that Clark and Sidway were jointly interested in the purchase of any other lots than those, which were conveyed by Cleaver and wife to Sidway, by the deed of August 12, 1872, or that they had any controversy with respect to any other property. I only refer to this correspondence for the purpose of showing, that there was evidence in the case before the jury, *tending* to establish (personally I would say, *absolutely establishing*) the fact, that Mr. Clark was involved with Mr. Sidway in the purchase of the Cleaver lots, and, therefore, under obligations to protect Mr. Sidway to the extent of one-half of the purchase money and all expenses connected with the transaction.

Only a few questions of law can arise upon such a record to be considered by this court, and the brief of the learned counsel for the plaintiff in error, raises but few.

But before considering the points, which are made on behalf of the plaintiff in error, I desire, again, to call the attention of the court to the question of its jurisdiction to hear, consider and determine any question upon the merits of the case.

II.

IT IS RESPECTFULLY SUBMITTED THAT THIS COURT HAS NO JURISDICTION OF THE WRIT OF ERROR IN THIS CASE, AND FOR THE REASON THAT THE JUDGMENT UPON WHICH THAT WRIT OF ERROR HAS BEEN SUED OUT, IS FOR A SUM LESS THAN THE AMOUNT NECESSARY TO GIVE TO THIS COURT JURISDICTION TO INQUIRE INTO THE RECORD OR THE ERRORS OF IT.

Late in the October term, A. D. 1888, of this court, a motion was submitted to dismiss the writ of error in this case for want of jurisdiction. The sole ground, upon which that motion rested, was, that the judgment of the Circuit court was a money judgment for only the sum of $4,000, and therefore less than the sum necessary to give the right of review either by appeal or writ of error to this court under existing laws. I am advised that the motion thus made, was overruled, but for what reason has never appeared, as no opinion in the case was filed. It is possible, that the court regarded the reasons assigned for the motion *too unimportant to be considered or made the subject of an opinion.* It may be possible, also, that the court mentally reserved the consideration of the motion to the final hearing of the case. *I only know*, that similar motions, apparently under similar facts, have been conconsidered *and sustained* by this court, both before and since the motion, in this case, was presented and considered.

If this court has no juri-diction to consider the questions attempted to be brought before it by the writ of error, that fact appears upon the face of the record: and, under the opinion in the case of *Morris* v. *Gilmer*, 129 U. S., 315, which seems to me, in respect to the matter of pleading, to carry the doctrine too far, I need only suggest the want of jurisdiction and the court will act upon it of its own motion, if it is not already concluded by the apparent results of its former examination.

I do not care to repeat the argument made *or attempted to be made*, upon the formal motion to dismiss the writ of error, which, when made, seemed and still seems to me to have some merit in it. I simply call attention to some of the authorities then cited and discussed, viz:

Thompson v. *Butler*, 95 U. S., 694.
Hilton v. *Dickinson*, 108 U. S., 165.
Opelike City v. *Daniels*, 109 U. S., 168.
Ala. Gold Life Ins. Co. v. *Nichols*, 109 U. S., 232.
Dows et al. v. *Johnson*, 110 U. S., 283,
First Nat. Bank v. *Redick*, 110 U. S., 224.

Also to the following cases decided, or, at least reported, since the formal motion to dismiss was submitted, viz:

Pacific P. Tel. Cable Co. v. *O'Connor*, 128 U. S., 394.
N. Pac. R. R. Co. v. *Austin*, 135 U. S., 315–318.

These later cases would seem to have some bearing upon the question of jurisdiction.

III.

The learned counsel for the plaintiff in error commences his argument with this proposition (Brief, 8): "*In this case we insist that plaintiff*" (Sidway), "*must re-*"*cover, if at all, on the theory that he paid off the Cleaver*"*note, and that Clark was indebted to him for contribution.*"

This proposition is not assented to. It does not express, even approximately, the facts of the situation, or the relations of the parties to it. There are left out two *important and controlling* considerations, which must not be ignored, namely: 1st. The Cleaver note had been, early in 1879, sold by the bank for $2,000, and the net proceeds credited upon Sidway's *personal* note, to which it was held as collateral. 2d. The trust deed upon the lots, to Gallup, to secure the Cleaver note, had been foreclosed, regularly, under a power of sale contained in the trust deed, and the net proceeds credited upon the Cleaver note. For the balance of the Cleaver note, thus left unpaid, amounting to upwards of $6,000, besides interest, Mr. Sidway was liable, absolutely, under the assumption clause in the deed from Cleaver to him. Mr. Clark was liable, generally, by reason of his participation in the purchase, but *especially by reason of his assumption and agreement, to pay one-half of such sums*, in the deed from Sidway and wife to himself.

The holder of the collateral note was entitled to the benefit of all the securities outstanding, applicable to the payment of that note, and amongst those securities was Mr. Clark's agreement to pay one-half of it, in the deed he had received from Sidway. The lots had been exhausted. Personal security only remained. The holder of the note

was entitled to resort to any, either or all of the parties, whose obligations to pay the note, or any part of it, were available to him. Mr. Clark's assumption and obligation ran, of course, directly to Mr. Sidway, but it was an assumption and obligation for the benefit and protection of the holder of the Cleaver note, and, hence, such holder had the right to avail himself of this assumption and obligation, in the name of Mr. Sidway for his benefit, and *in that form, the pending action was brought.*

It is for this reason, that the proposition of the learned counsel for plaintiff in error cannot be accepted as comprehensive of the situation. It is wholly immaterial, whether Sidway had paid the Cleaver note, when this action was commenced, nor is it material that Sidway subsequently, as the record shows, adjusted and paid all his personal obligations to the Illinois Trust and Savings Bank, including his demand note for $8,000, given on account of the Cleaver purchase. Such adjustment and payment simply changed the application of the proceeds of the judgment, which might be recovered upon Mr. Clark's personal assumption of one half of the Cleaver note. The court will not fail to observe, that by the terms of the deed from Sidway to Clark, Mr. Clark absolutely assumed and agreed to pay one-half of this original note, etc., as well as to indemnify Mr. Sidway. (Rec. 19.) The one-half of that note unpaid, after the credit for the sale of the lots, with interest thereon, exceeds the amount of the judgment in this case. It is respectfully submitted, that these suggestions, abundantly supported by the record, make important and controlling modifications of the proposition upon which the principal argument of the counsel for the plaintiff in error is predicated.

As already shown by reference to the record, the original trust deed by Cleaver to Gallup was, legitimately, foreclosed in July, 1879. Indeed, no question is made as to the regularity of the sale of the Cleaver note, or to the foreclosure of that trust deed. *This foreclosure put an end to the title of Sidway and Clark in the property itself.* It did not, however, relieve Sidway from the payment of his individual obligation to the Illinois Trust and Savings Bank upon his note, which represented that incumbrance upon the lots, except to the extent that that incumbrance was paid by the sale of the lots. That obligation was for a definite amount owing by him personally to the bank, and was recognized by him as such, and ultimately, and before the recovery of the judgment in this case, had been fully paid and discharged by him. There is no claim or pretense, that Mr. Clark can be called upon to pay any part of the original price of the Cleaver lots, or the expenses of carrying that purchase, beyond the amount of the original obligation assumed by him in the deed, which he received for the undivided half of those lots; and it cannot be questioned, that such liability attached to Mr. Clark, by reason of his personal assumption, as soon as the Cleaver note matured. The payment of that part would relieve Mr. Clark, *immediately*, from all responsibility under his assumption, leaving the balance of the Cleaver note to be paid, *absolutely*, and without recourse to Mr. Clark, by Mr. Sidway. To the bank or to Mr. Lindgren as the holder of the original note, Mr. Cleaver as the maker of that note, was undoubtedly responsible, and for the whole amount unpaid thereon. So, also, was Mr. Sidway by reason of his assumption of the whole of the note in the Cleaver deed; but there was never any

time, when Mr. Clark was liable for more than one-half of that note and interest, and one-half of the expense of carrying the property, and for this, and *especially one-half of the note and interest*, Mr. Clark, was, at once, responsible upon the maturity of the note, to wit: on the 1st day of July, 1875, by virtue of his interest originally in the purchase, although his personal and independent obligation for this one-half was not specifically expressed until the execution and acceptance of the deed from Sidway to him of November 23rd, 1875.

In the course of his argument, and referring to the time, when this action was commenced, the counsel says (page 9 of his brief):

"Sidway had paid no part thereof" (of the note) "unless this transaction of May 2, 1875, is to be treated "as a payment, and if so, then the Cleaver note and "mortgage was extinguished, and Sidway, upon plaint- "iff's theory of buying the property and selling it on "joint account, must account for the property. Sidway, "if he paid the note and trust deed May 2, 1875, paid it "in pursuance of his previous agreement with Charles "Cleaver. Will it be claimed in this case, that, as to "Charles Cleaver, the maker of the note and trust deed, "the same were kept alive, and that Charles Cleaver "would be held liable to the bank for the balance after "crediting the note with $2,000, the amount of Lind- "gren's debt?"

The counsel is evidently confused in his dates. There is no date in the whole record, which has any relation to May 2, 1875. On July 1, 1875, the Cleaver note matured. There was no need of any change in the situation until then. On the 2d of July, 1875, for the protection of the purchase, Sidway gave his *personal* note to

the bank for the full amount of that note, upon the understanding and arrangement, hereinbefore referred to, *apparently*, at least, for the mutual benefit and accommodation of himself and Mr. Clark. The Cleaver note passed directly to the possession of the bank from the previous holder of it, and it is immaterial to the plaintiff in error, whether Cleaver was afterwards liable upon his original note or not. His obligation to pay one-half of it rested upon him *personally*, without reference *either to Mr. Cleaver's or Mr. Sitzway's obligation to pay the whole*. As already stated, his equitable obligation to pay one-half of the note and interest by reason of his interest in the original purchase, became fixed, *at the maturity of the Cleaver note*, and his payment of that one-half upon the note, would have satisfied that obligation at any time. *The deferring of that payment under the arrangement made by Sidway on the 2d of July, 1875, in no way affected his liability*. This equitable obligation became a fixed legal and personal liability under the deed to him from Sidway. It is, therefore, submitted, that the authorities which counsel refer to in this connection, namely:

Day v. *Humphreys*, 79 Ill., 452.
Johnson v. *Walker*, 60 Iowa, 315.
Byington v *Fountain*, 61 Iowa, 514,

are inapplicable to the present case. They are not cases in line with the facts in the case here presented. Counsel is evidently laboring under a misapprehension, not only of dates, but, also, *of the substance of the transactions* between the parties, and this appears in that clause of his brief, which immediately follows the citation of the authorities above mentioned, *for the record does not show that Sidway had any participation in the closing out of the Cleaver securities, or that he realized any advantage there-*

from. It does not show that Sidway paid the Cleaver note on the 2d of July, 1875, or that he did anything in respect to that obligation, other than to arrange with the bank, of which he was then an officer, to take his personal obligation, with the Cleaver note and security, as collateral thereto, for the amount of the incumbrance upon the lots, the bank to carry the loan for the accommodation of himself and Mr. Clark at its discretion. It is, therefore, outside of any legitimate issue in this case to inquire whether Mr. Cleaver, or anybody else could be held liable for the original note, secured by the incumbrance upon this particular property; and, *when the jury has settled the question of fact as between the parties, including this very subject-matter*, it does not seem possible, that counsel for plaintiff in error can now raise for the consideration of this court any such question of fact. It must be assumed, also, that the entire question in all its equitable bearings, was involved in the chancery suit already referred to. It was one of the questions insisted upon in the progress of the hearing before the court in this case; it was settled *adversely* to the claims now presented by counsel, for the jury decided against him upon all matters of fact thus involved.

IV.

THE OBJECTIONS TAKEN BY THE COUNSEL FOR PLAINTIFF IN ERROR TO THE CHARGE OF THE TRIAL JUDGE, DO NOT SEEM TO ME TO BE WELL FOUNDED, THE FACTS OF THE CASE CONSIDERED:

If the court will examine the charge, as set out in the bill of exceptions, instead of the *detached* portions of it specially referred to in the brief of counsel, it will find

that the learned judge very fully explained to the jury the situation of the parties and fairly and fully instructed them as to the law applicable to the facts *as the jury might find those facts to be.* There was no effort in the charge to control or influence the finding of the jury upon the controverted facts of the case. Indeed, *the charge admits, that there is a contradiction, almost absolute, between the testimony of Mr. Clark and of Mr. Sidway as to the facts, and that this contradiction must be considered by the jury,* and adjusted by reference to other testimony in the case, and especially to the correspondence between the parties.

It does not seem to me to be important, in this connection, to consider in detail the special parts of the charge to which the brief of the counsel makes reference. The whole charge is before the court, and must, of course, be examined, in order to determine, whether upon the whole, it fairly stated the law applicable to the facts, *as they might be found by* the jury.

There is, however, one further statement in the brief of counsel for plaintiff in error (pages 11 and 12) which should perhaps receive some attention.

It is quite impossible to understand the fairness of the following quotation from the brief: "After admitting "evidence that clearly tended to establish the fact that "Sidway had secured to himself the full benefit of the "legitimate rise in the value of the property, and that the "foreclosure and sale under the trust deed was all a sham "for Sidway's benefit, and after the defendant's counsel "had addressed the jury upon this defense, the court told "the jury in terms as follows: 'In short, I see nothing "in the case anywhere to prevent the plaintiff from re-"covering what he claims here, about $6,700 and some

"cents, provided the jury find the main issue in the case "in favor of the plaintiff—that is, that Clark assented to "become with the plaintiff a joint purchaser, or pur- "chaser on joint account with the plaintiff of the prop- "erty in question.' (See Rec., 42.) This is the fourth "assignment of error.

"Embraced in the same instruction and in this fourth "assignment of error is the further error, of utterly "ignoring the fact that the bank held the Cleaver note "and mortgage and had sold them under a power of at- "torney, and still claimed to own them until 1883, and "that this was two years after this suit was brought. "When this suit was brought in 1880, it was upon the "theory that John Lindgren owned the Cleaver note "and mortgage, and the suit purports to have been "brought for his use, but Lindgren's disclaimer disposes "of that theory.

"The instruction of the court is based upon the theory "that Sidway paid off the note by substituting or giving "his own note to the bank. But the facts are that Sid- "way's note was given to the bank for borrowed money. "This money was paid to Gallup & Peabody. Gallup & "Peabody assigned the note, not to the bank, but to Sid- "way, and Sidway undertook to pledge the Cleaver note "and to assign it in the name of himself and Clark as "security for his own debts to the bank, not only for the "$8,000, borrowed then, but also for other money pre- "viously borrowed. (Rec., 20.)

"Whatever right or title the bank got to the note and "mortgage of Charles Cleaver, they got through the as- "signment to them by Sidway. The bank claimed the "right to the Cleaver note and mortgage under and by "virtue of Sidway's assignment and the power of at-

"torney executed to the bank by Sidway, and its sale to "Lindgren. The charge of the court ignored the real "transaction as set forth in the evidence."

It is unnecessary to prolong this quotation. THE ASSUMPTION OF FACTS which it contains cannot be assented to, and the verdict of the jury has settled every issue of fact adversely to the assumptions of the counsel. On page 20 of the printed record Mr. Sidway expressly states, that the Cleaver note never came into his possession, but admits, at the same time, that, as collateral to his individual note for the same amount, it was held by the bank, in pursuance of the transaction then consummated, and that his individual note contained a clause pledging the Cleaver note as security therefor. This was probably in the usual form of notes with collateral security, adopted and in use by the bank at that time. But at the bottom of the paper pledging the Cleaver note as security appears this statement, viz: "This "is for joint account of myself and Ezekiel Clark, "Iowa City, Iowa, L. B. Sidway." The purpose of the transaction is thus clearly defined upon the face of the paper. Now, at page 32 of the same record, is the testimony of Mr. Lindgren, who purchased the Cleaver note at the sale made by the bank, and in which he says he purchased the note and paid for it the sum of $2,000 by giving his check for that amount. He also states, that he received that money back without loss, and that he has no interest in the suit pending against Mr. Clark, and knew nothing about the suit. It further appears (Rec., 34) that Gallup, as trustee, made the deed of the Cleaver lots to Mr. Lindgren under his foreclosure sale, dated July 15, 1879; and all these transactions were before the court and the jury for their consideration when this case

was tried. It may be presumed, also, with fairness, that they were before the court upon the hearing of the chancery case before referred to, of *Clark* v. *Sidway*. In both of these cases, *certainly* in the lawsuit, full effect was given to them for the establishment of all facts, which the plaintiff in error can now claim for them, and the equitable rights of the parties, if they could, by any possibility, be considered in this case, must be regarded as settled in the disposition of the chancery proceeding. It is not fair, therefore, to claim, as the counsel for the plaintiff in error does claim, that all these proceedings [illegible] up to the final sale and disposition of the Cleaver notes, and the trustee's sale of the lots, were controlled and managed by and in the interest of Mr. Sidway; for the record is absolutely bare of any suggestion even, that Mr. Sidway participated in those proceedings, either openly or covertly, or that they or any of them were undertaken at his suggestion, or for his use or benefit.

But the suggestion of counsel, that Mr. Sidway could not, *for his own personal benefit* have brought this suit prior to the actual payment of the Cleaver note by himself, is not a suggestion so free from doubt as he seems to have supposed it to be. He admits, that Mr. Sidway had by the giving of his individual note, become personally obligated, for the amount of the Cleaver note as an addition to his assumption in the deed from Cleaver. There are many authorities which hold, that an agreement to accept a surety as the sole debtor, operates as a payment by him of the joint debt, and places him, at once, in a position to compel contribution from his co-surety, or from the principal in the debt. Of these cases the following are illustrations:

Robertson v. *Maxcey*, 6 Dana, Ky., 101.

White v. *Carlton*, 52 Ind., 371.
Kellar et. al. v. *Boatman*, 49 Ind., 104.
Pitzer v. *Harmon*, 8 Blackf., 112.
Bennett v. *Buchanan*, 3 Ind., 47.

I do not regard it as important to press this point, and for the reason already stated, that Mr. Clark's obligation to pay one-half of the Cleaver note and interest became absolute and personal by the assumption clause contained in the deed to himself from Sidway.

V.

The counsel for plaintiff in error make the further proposition (Brief, 12):

"*The court refused to instruct the jury that the agree-*
"*ment claimed by plaintiff, if established, constituted a co-*
"*partnership, and that the accounts between them could*
"*not be adjusted, in an action at law.*"

"*The conduct of the jury in failing to make any esti-*
"*mate of the damages, and forgetting what plaintiff*
"*claimed, and the action of the court in reducing the ver-*
"*dict to $4,000, after instructing it to find $6,700, shows*
"*the importance of not having this accounting in an ac-*
"*tion at law.*"

If I understand the somewhat confused phraseology of the learned counsel, it is his purpose to claim, that the transaction between Sidway and Clark in the purchase of the Cleaver lots, *constituted a copartnership* between them, which could only be adjusted and closed by a proceeding in equity. This cannot be admitted. Here was a single and special adventure on joint account, involving originally only the payment in equal proportions of particular

and designated sums of money. There were no complications in the matter, which involved the necessity of a reference to a master to state an account between the parties, or to the special jurisdiction of courts of equity in the settlement of such accounts. There were no creditors or debtors whose interests were to be considered in the adjustment of equitable rights, as between the parties. In such cases there is no occasion for the intervention of chancery jurisdiction. The parties were tenants in common, or joint owners of a particular parcel of land. The purchase money and the expenses of carrying the property were the only matters to be adjusted between them.

In 9 Am. & Eng. Encyc. of Law, 128, it is said:

"Assumpsit is a proper action for a joint tenant or tenant in common, to bring against his co-tenant for his share of the proceeds of the common property sold by them."

"It may also be maintained by one against another, when the latter has received the whole or a greater part of the rents and profits, and such action will not bar his rights to an equitable adjustment and lien.

"This is also the proper form of action for one co-tenant to recover a contributive share from another, when the former has incurred expenses for repairs or improvements, or has made advances to remove a joint incumbrance, or to recover for waste, or for a balance due from one co-tenant to another, after the joint interest is determined."

The following cases are referred to:

Jordon v. *Soule*, 79 Me., 590.
Gwinneth v. *Thompson*, 9 Pick., 31.

Haven v. *Mehlgarten*, 19 Ill., 91.
Fowler v. *Fowler*, 50 Conn., 256.
Dickinson v. *Williams*, 11 Cush., 258.
Fisher v. *Kinaston*, 18 Vt. 489.
Fanning v. *Chadwick*, 3 Pick., 420.

In *Coles* v. *Coles*, 15 Johnson, 159, which was a case by an administratrix to recover from the intestate's former partner in business, a share of the proceeds of certain lands held by the defendant and intestate in common, a nonsuit was moved for by defendant's counsel on the ground that this was a partnership transaction and required an investigation of partnership accounts. The court said (page 160) "No objection can be made to the "recovery on the ground of any existing partnership be- "tween Stephen and Willet Coles. They were tenants in "common, not partners in this land. The principles and "rules of law applicable to partnerships and which govern "and regulate the disposition of partnership property do "not apply to real estate. One partner can convey no "more than his own interest in houses and other real es- "tate, even when they are held for the purposes of the "partnership."

A note to 1st Collyer's Law of Partnership, section 2, says: "A mere community of interest in property does "not create the relation. But it must be evident that the "parties intended to create it and must be voluntary. "* * * An agreement to share the profits and losses "on the mere sale of a particular parcel, does not create "a partnership."

See, also,

1st Collyer's Law of Partnership, p. 70, note.
Galbreath v. *Moore*, 2 Watts, (Pa.) 89.
Harding v. *Foxcroft*, 6 Me., 76.

All these authorities sustain the position, that a single joint adventure does not constitute the parties to that venture, partners in such a way as to require the interposition of a court of equity in the adjustment of the accounts with reference to that venture between themselves, and that an action at law is the appropriate remedy.

VI.

The further point seems to be made in the assignment of errors upon this record, and only incidentally referred to in the brief of counsel, that the court below erred in allowing the *remittitur* from the verdict of the jury and directing the judgment on that verdict, less the *remittitur*, which reduced the amount of the judgment to the sum of $4,000. This *remittitur* was made, as appears from the record (page 45) upon the intimation of the court below of an intention to overrule the motion for a new trial, "Provided the plaintiff would remit all damages "mentioned in said verdict in excess of $4,000." It is of little use to attempt to speculate upon the reason, which the presiding judge may have had for this intimation of an intention. It may have been, that upon the consideration of the whole case, he was disposed to think that the verdict embraced items not properly allowable under the declaration stating the cause of action.

Whatever the reason or reasons may have been, the *remittitur* cannot be accounted as one *fraudulently* made, for the purpose of avoiding the jurisdiction of this court, and because such *remittitur*, if it is necessary to explain it at all, was, at least, $1,000 more than such a purpose would seem to have justified. It is unnecessary to say, perhaps, that the *remittitur* was assented to in view of

closing a litigation long protracted and expensive, and out of which some results had finally been reached. Several of the cases which have been referred to as bearing upon the right of the defendant in error to have this case dismissed out of this court, for want of jurisdiction, bear upon this subject.

In the case of *Thompson* v. *Butler*, 95 U. S., 694, this court says (page 695): "Our jurisdiction cannot be in- "voked until the final judgment below has been ren- "dered, and *we cannot open the record to look for errors* "*until jurisdiction has been established.* The court below "retains full control of a cause, until final judgment has "been entered, and it follows, that, if for any reason a "judgment is given against a defendant in a case involv- "ing the plaintiff's cause of action alone, unaffected by "counter-claims for set-off, or a sum less than our *juris-* "*dictional* amount, *we have no power, at the instance of the* "*defendant, to correct errors that may have been com-* "*mitted in settling the amount.* We can only look at the "verdict through the record. And if the record is closed "to us, so necessarily must be the verdict."

Further on the courts say: "Necessarily verdicts are, "to some extent, subject to the control of the court. It "is not unusual for a court to announce, that a new trial "will be granted unless a part of the verdict shall be re- "mitted, and to enter judgment upon the reduced amount "if the suggestion is followed. *All such matters can be* "*properly left to the sound judicial direction of the court* "*in which the trial is had.*"

We will assume, that after the sale of the Cleaver lots under the trust deed to Gallup, and a full credit upon the Cleaver note of the *entire* proceeds of that sale, to wit, $2,000, there remained an unpaid balance of $6,000, one-

half of which only, the plaintiff in error was responsible for. That sale took place on or about the 25th day of July, 1879; $3,000 only of that balance then remained which Mr. Clark had assumed and agreed to pay. His liability, then, was *upon his special assumption* to pay the sum of $3,000, with accumulating interest until paid. This interest at six per cent. only, would amount, at the time the verdict was rendered, to the sum of $1,620, making the amount owing by him upon his assumption of one-half of the Cleaver incumbrance, and leaving out of account all the claims made by defendant in error, in excess of the principal and interest upon that note, over and above the amounts actually paid by Mr. Clark, the sum of $4,620. The *remittitur* was an advantage to the plaintiff in error of, at least, the sum of $620; and of this, it is respectfully insisted, that he has no reasonable ground to make complaint. And it is again insisted:

1st. That this writ of error should be dismissed for want of jurisdiction in this court to consider any of the errors assigned upon the record; and

2d. If that motion cannot prevail, that the judgment in the court below should be affirmed.

JNO. N. JEWETT,
Atty. for Deft. in Error.